Supreme Court, U.S.

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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

ROBERTSON OIL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

ROBERT L. JONES, JR.
JONES, GILBREATH, JACKSON & MOLL
P.O. Box 2023
Fort Smith, AR 72902
(501) 782-7203

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

WILLIAM H. SUTTON
KEVIN A. CRASS
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Bldg.
400 West Capitol Avenue
Little Rock, AR 72201-3493
(501) 376-2011

WILLIAM G. PAUL
NEAL F. LEHMAN
PHILLIPS PETROLEUM COMPANY
1136 Adams Bldg.
Bartlesville, OK 74004
(918) 661-5650

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

156 AP

QUESTIONS PRESENTED

1. Whether a federal court of appeals, sitting *en banc*, is bound by previous interlocutory panel decisions by virtue of the "law of the case" doctrine.

2. Whether the Arkansas "shock the conscience" standard of review of punitive damage verdicts, on its face or as applied here in a diversity case, violates the Due Process Clauses of the Fifth and Fourteenth Amendments.

3. Whether the imposition of two separate $4,000,000 punitive damage awards on petitioner for causing a single injury to respondent contravenes federal procedures governing punitive damages or violates the Due Process Clauses of the Fifth and Fourteenth Amendments.

PARTIES INVOLVED

All parties in the court below are listed in the caption. Petitioner Phillips Petroleum Company, which has no parent corporation, has the following non-wholly owned subsidiaries: Adelphi Property Management Limited, Arctic LNG Transportation Company, Consorcio Industrial Brasileiro S.A.-Coninbra, Drilling Specialties Company, Eagle Sun Company Limited, International Energy Limited, Kenai LNG Corporation, Norland GMBH Fur Grundbesitz Und Industrieanlagen, Phillips Morrison Resources Ltd., Phillips Oil (GB) Limited, Phillips Oil Trading Limited, Phillips P.C. Resources Ltd., Phillips Petroleum Chemicals, Phillips Petroleum Chemicals U.K. Limited, Phillips Petroleum Company United Kingdom Limited, Phillips Petroleum Exploration Limited, Phillips Petroleum International A.G., Phillips Petroleum International Babuyan Ltd., Phillips Petroleum International Canada Ltd., Phillips Petroleum International Corporation Denmark, Phillips Petroleum International France, Phillips Petroleum International Palawan Ltd., Phillips Petroleum International S.R.L., Phillips Petroleum Pension Trustees Limited, Phillips Petroleum Products Limited, Phillips Petroleum Singapore Chemicals (Private) Limited, Phillips Quimica S.A. De C.V., Philtankers Inc., Polar LNG Shipping Corporation, Proteina Brasileira Ltda., Venezoil, C.A.

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**On Petition For
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United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

Phillips Petroleum Company ("Phillips") respectfully petitions this Court for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Eighth Circuit. That court affirmed two separate $4,000,000 punitive damage awards against Phillips for an alleged failure to keep a gratuitous promise that caused respondent Robertson Oil Company ("Robertson") to suffer a single compensatory injury of $750,000. In so holding, the court concluded that, while rehearing the case *en banc* after a final panel decision, it was bound by the "law of the case" doctrine to perpetuate errors committed by earlier panels during interlocutory phases of the appeal proc-

the trial court imposed the civil penalty, and that the trial court did not tell the jury of the penalty as part of the reprisal claim. *Id.* at 678. The appellate court also decreased the punitive damage award relying on *Haslip*. *Id.* at 679.

This leaves us with the question of whether the punitive damage awards in this case are duplicative. Considering the awards under principles of Arkansas law, the actual damages are identical under each of the theories submitted to the jury. Similarly, the financial and social condition and the standing of the parties, are identical with respect to both punitive damage awards.

On the other hand, the nature, extent, and enormity of the wrong, the intent of the party committing it, and the general circumstances attending the particular transaction involved, differ with respect to each of the two awards. These differences are evidenced by the specific jury instructions on each claim. The court instructed the jury that an earlier jury had found the several elements which entitled Robertson to recovery for tortious interference with contract. The court instructed the jury that the previous jury had found:

> First, that there was a valid contract between Robertson Oil Company and Spe-Dee Mart; second, that Phillips Petroleum knew of that contract; third, that Phillips intentionally interfered with that contract by inducing or causing its termination; fourth, that with respect to intentional interference with contract, Phillips was not acting in its own fair interest based upon reasonable economic and business considerations, but with an intent to cause injury or damage to Robertson Oil Company.

The court then instructed the jury on the elements of fraud, stating that the jury should find for Robertson on its fraud claim if it found:

> First, that Phillips made false statements of material fact to Robertson Oil; second, that Phillips knew or believed that the statements were false or lacked a sufficient basis of information t make the statement; third, that Phillips intended to induce Robertson Oil to act or to refrain from acting in reliance on the statements; fourth, that Robertson Oil justifiably relied on the statements in acting or refraining from acting; and fifth, that the actions of Phillips were a proximate cause of damages to Robertson Oil.

With respect to Robertson's claims for punitive damages, the court instructed the jury that it must find that Phillips "intentionally pursued a course of conduct for the purpose of causing injury or damage." The court also instructed that the purpose of punitive damages was "to punish a wrongdoer and to deter others from similar conduct." These aspects of the punitive damage instruction relate directly to the nature, extent, and enormity of the wrong and the intent of the party committing the wrong. It is evident that the jury's deliberations were directed to two different torts and two different injuries, each of which supports an award of punitive damages.

There is one further element in the equation. In the first appeal, Phillips argued against the single punitive damage award returned in the first trial, taking the position that there were in fact two separate injuries. Phillips' reply brief in *Robertson I* argues that there are two bases for punitive damages:

> The punitive damages award herein is in the form of a general or "global" verdict. It is impossible to apportion the award among the various theories of liability found by the jury, because none of the liability interrogatories refer to punitive damages, but only to "damages" in gen-

> eral, and neither of the punitive damages interrogatories are tied to specific torts.
>
> Punitive damages are not intended to compensate an injured party, but to punish and deter conduct of the offending party. Therefore, the existence and size of an award of punitive damages depends upon the conduct of the defendant, not upon the loss to the plaintiff. The loss to Robertson Oil reflected in the compensatory damages interrogatory has no bearing on the punitive damages award.

Phillips' argument continues and makes specific the two differing timeframes of the conduct that might support punitive damages:

> Phillips' relevant conduct differs according to the various theories of liability affirmatively answered by the jury. The key conduct on the tortious interference count allegedly occurred during the meeting between the Phillips representatives and Spe-Dee Mart. However, Phillips' relevant conduct on the fraud, negligence and bad faith counts occurred prior to that time, i.e., in the period up to the October, 1984 meeting between Phillips and Robertson Oil. Yet the jury was permitted to assess punitive damages on every action of Phillips from May through October, 1984, i.e., on *all* conduct of Phillips which supported *all* of the elements of *all* of the causes of action represented by interrogatories Nos. 2-5.

To accept Phillips' argument that both punitive damage awards spring from but one injury requires that we reach a conclusion totally at odds with that embraced by Phillips in the first appeal, a conclusion which led to our holding that separate elements are to be considered in awarding punitive damages, depending upon the nature of the tort involved. *Robertson I*, 871 F.2d at 1376. Although we af-

firmed only a single award of actual damages in *Robertson I*, we are convinced that there were two distinct wrongs giving rise to punitive damages, and Phillips is bound by its admission in the first appeal.[11] In a sense, as Robertson argues, Phillips got what it asked for in the second trial, namely, separate consideration of the punitive damage issue and a separate award by the jury. Phillips is bound in this litigation by the position it took in the first appeal, and its answer that there are duplicative punitive damage awards is most effectively answered by the arguments it asserted in the first appeal. Under these circumstances, we do not believe that the common factors in the two punitive damage awards—namely the amount of actual damages for the single injury and Phillips' net worth—are sufficient to justify a different conclusion.

The jury instructions and the juries' answers to the interrogatories show that the jury based its punitive damage awards on two different tort theories. Phillips argues that the key conduct on the tortious interference count occurred during the meeting between Phillips' representatives and Spe-Dee Mart, which we know from *Robertson I*, occurred in October 1984. *See* 871 F.2d at 1370. The relevant conduct with respect to the fraud, however, occurred in the period between May and the time of the

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[11] Judicial estoppel bars a party from taking inconsistent positions in the same litigation. *Morris v. California*, 966 F.2d 448, 452 (9th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3257 (U.S. Oct. 5, 1992). As the Ninth Circuit recently explained, there are two views regarding the applicability of the doctrine. The majority of circuits hold that judicial estoppel does not apply unless the inconsistent statement was actually adopted by the court in the earlier litigation. *Id.* at 452 (citations omitted). The First Circuit, however, holds that the doctrine applies even when the litigant was unsuccessful in asserting the inconsistent position, if by his change of position he is playing "fast and loose" with the court. *Id.* at 453 (citing *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)). We need not decide in this case whether to adopt the majority or minority view, in either instance, Phillips is estopped from asserting that there was only one wrong.

October 1984 meeting. *Id.* at 1369-70. Phillips has thus divided the conduct subject to punitive damages into two distinct timeframes, the day of the meeting, and the five-month period leading up to that meeting.

It is evident here that the jury found two separate patterns of conduct: the meeting in October 1984 gave rise to the tortious interference punitive damage award, and the conduct during the five-month period leading up to but not including that meeting gave rise to the fraud claim. Thus, the case differs from *Holmberg*, in which this court held that the defendants had injured Holmberg only once and, accordingly, should be punished only once. *See* 800 F.2d at 212. Similarly, the case differs from *Superturf*, in which the duplication was found between a treble damage award under antitrust statutes, and a punitive damage award for tortious interference with business. *See* 660 F.2d at 1283. *Stoner v. Houston* is distinguishable for the same reason. *See* 582 S.W.2d at 30-31. While Minnesota law does not control this case, the decision of the Court of Appeals of Minnesota in *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670, is also factually distinguishable. That court concluded that the jury assessed its punitive damage award on the same misconduct which the trial court punished by assessing a civil penalty. *Id.* at 678. Here, although there was a single compensatory injury, there were two separate wrongs supporting the punitive damage awards, and the awards are not duplicative.

The record is silent as to whether Robertson requested a cautionary or limiting instruction to guard against the jury considering overlapping conduct on each of the two punitive damage claims. It should have been evident that by submitting two specific claims for punitive damages on two different theories the potential existed for this to occur. Further, we do not know whether Robertson raised the question of duplication before the district court. Certainly, it was not discussed in the district court order, and

such an argument was not pressed in the second appeal of this case. *See Robertson II*, 930 F.2d 1342.

We conclude that the punitive damage awards are not duplicative, and we note that each of the jury awards was approximately five and on-third times the actual damage award. The two together are approximately eleven times the actual damage award. On the record before us, we do not believe that such an amount is sufficient to shock the judicial conscience or to demonstrate that the jury was motivated by passion and prejudice. As the district court observed, strong issues of credibility arose in the trial of the case. The district court specifically commented that a reasonable factfinder could have thought Phillips' principal witnesses were deliberately evasive and that they had guilty minds. Under such circumstances, we should not disturb the jury verdict, and we do not believe that *Haslip*, 111 S. Ct. 1032, or due process principles require us to do so.

We affirm the judgment of punitive damages for fraud in the amount of four million dollars, and for intentional interference with contract in the amount of four million dollars.

BEAM, Circuit Judge, dissenting.

I respectfully dissent. Cases like this must have been on the mind of the Supreme Court when, in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), it said "[w]e note once again our concern about punitive damages that 'run wild.' " *Id.* at 1043. My concern comes in three parts and dates back to *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989) (*Robertson I*).

I.

In *Robertson I*, as noted in the majority opinion, we analyzed several theories of recovery advanced by the

plaintiff, found all but one of them wanting, and reversed for a partial new trial. We conceded that the district court was correct in finding that "all of the liability theories rested upon only one basis for actual damages." *Id.* at 1376. We embraced the statement of the district court that, concerning actual damages, "All roads lead to Rome." *Id.* Instead of remanding for a new trial on all issues, however, we let stand a $750,000 judgment supported by a jury finding of "tortious interference with contract." *Id.* at 1369 & 1376. This was, in my view, an incorrect approach, for the reasons I set forth in my concurrence in *Ledferd v. Dowd*, Nos. 90-2090/2091/2782, slip op. at 32 (8th Cir. Nov. 11, 1992).[1] Although *Ledferd* involved a constitutional tort, the principles and policies I referred to there apply here as well.

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[1] The author of the majority opinion (the author of *Robertson I* and *Robertson II*) states that I disregard the principles of the law-of-the-case. I fully understand his discomfort with my suggestions that errors may possibly have been made at earlier times in this dispute, and, we do deal with the *same* dispute today that we were dealing with in *Robertson I* and *Robertson II*. With the greatest respect, I suggest that there seems to be a modicum of misunderstanding between us on the law-of-the-case doctrine. This circuit has said that the "law-of-the-case doctrine is a discretionary one." *United States v. Callaway*, 972 F.2d 904, 906 (8th Cir. 1992). I concede that a decision in a prior appeal is usually followed "unless . . . the prior decision is clearly erroneous and works a manifest injustice." *Id.* at 905. Or, if the facts have changed since the earlier appeal, the doctrine is not followed. *Little Rock School Dist. v. Pulaski*, 971 F.2d 160, 165 (8th Cir. 1992). I believe we are faced with some change in the facts due to the evidence adduced at the trial level and also with the possibility of manifest injustice to Phillips as the case has now developed. Finally, the doctrine applies only to issues decided by final judgments. *Peterson v. General Motors Corp.*, No. 91-2646, slip op. at 6 (8th Cir. Sept. 16, 1992) (citing *Smith v. Mark Twain Nat'l Bank*, 805 F.2d 278, 286 n. 16 (8th Cir. 1986)). Until we have acted on the appeal before us and all subsequent review has been denied, we have no final order on the issues of punitive damages raised today by Phillips.

II.

As noted by the majority, by the time we looked at this matter again, *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991) (*Robertson II*), *Haslip* had arrived on the scene. The Supreme Court stated that the "rational decisionmaking" required by the due process clause includes jury instructions that adequately guide the jury. *Haslip*, 111 S. Ct. at 1044. "[A]dequate guidance from the court [to the jury] when the case is tried to a jury properly enter[s] into the constitutional calculus." *Id.* at 1043. The "guidance" referred to in *Haslip* included instructions on the purpose of punitive damages, on consideration of the character and degree of wrong of the defendant, and on the necessity of preventing similar wrong. *Id.* at 1037 n.1. The instruction *excluded*, as specifically noted by the Supreme Court, any evidence of the defendant's wealth. *Id.* at 1044.

I earlier expressed my concern about the adequacy of the Arkansas pattern jury instruction on punitive damages in *Union Nat'l Bank of Little Rock v. Mosbacher*, 933 F.2d 1440, 1448 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 870 (1992). Essentially this same instruction was used in both *Robertson* cases and, in my view, the content falls well short of the constitutional requirements outlined in *Haslip*. The standardless approach permitted by the Arkansas instruction, coupled with consideration of an improper element (wealth of the defendant), has prompted the jury to "run wild" in this case and no amount of post-trial judicial review can correct the error.

In *Robertson II*, we rejected Phillips' attack on the punitive damages instructions because only a "general objection that the . . . instructions . . . violated the Fourteenth Amendment" was made. *Robertson II*, 930 F.2d at 1347. After a review of the record, I have difficulty perceiving the Fed. R. Civ. P. 51 violation purportedly committed by

Phillips.[2] Even if we accept the majority view on this, the constitutional overlay brought into play by *Haslip* dictates that this panel review the adequacy of the Arkansas instruction, adequate objection or not, to bring to an end its use in violation of the Fourteenth Amendment.

III.

The most troublesome aspect of the result reached by the majority is the affirmance of a $4,000,000 punitive damages award without an underlying award for compensatory (actual) damages. The law of Arkansas is crystal clear. "[P]unitive damages are not recoverable unless compensatory damages not only have been suffered by the plaintiff but also have been assessed by the jury." *Lake v. Lake*, 562 S.W.2d 68, 69 (Ark. 1978).

Upon retrial subsequent to *Robertson I*, the plaintiff chose to proceed upon only two of its theories of recovery, tortious interference with contract and fraud. Of course, according to *Robertson I*, plaintiff had prevailed on the tortious interference theory and had retained a compensatory damages verdict. Thus, the only issue with regard to this theory, as discussed, was punitive findings. Because we said in *Robertson I* that "[e]ach of these theories . . . would support a different amount of punitive damages, depending upon the conduct involved." *Robertson I*, 871 at 1376, the district court submitted the case to the jury on two separate interrogatories dealing with liability (for fraud) and punitive damages (under both theories). A proper analysis of the facts indicates that we were wrong in *Robertson I* and this directed the district court to a faulty approach in the trial leading to *Robertson II*. If all

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[2] Federal Rule of Civil Procedure 51 requires that "not party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

roads do not now lead to Rome for punishment purposes, and we are really dealing with two discrete intentional torts, each separate punitive award must also be supported by a separate compensatory award. The result reached by the majority, is bottomed on this statement: "It is evident that the jury's deliberations were directed to two different torts and two different injuries, each of which supports an award of punitive damages." Majority Opinion at 17-18 [75a]. To repeat, if we are really dealing with "two different torts [covering two different time periods as stated by the majority] and two different injuries," *id.*, then we need two different compensatory awards, a circumstance not reached in this case.

With respect, however, I think the separate award theory is simply wrong and a single award of punitive damages, if any are indeed due, is the only logical result that can arise from the core of facts presented to the jury by plaintiff. Any way you massage the events at issue, the ultimate damages occurrence in this case is the "loss of the Spe-Dee Mart account." *Robertson I*, 871 F.2d at 1376. The plaintiff is being compensated for that event and the defendant is being punished for bringing it about.

The majority states that the fraud claim is based upon communications and promises leading up to the October 1984 meeting, but not on the meeting itself. Majority Opinion at 20 [77a-78a]. On the other hand, it asserts that it is only the meeting itself that supports the tortious interference claim. *Id.* The pre-October communications, however, would not have been actionable at all had the Spe-Dee Mart account stayed with Robertson. Likewise, the October meeting would have led to naught by way of damages had the Spe-Dee Mart account been retained. The district court was correct; "All roads [do] lead to Rome" for both compensatory and punitive purposes.

The majority says, in essence, that even if this is true, Phillips got what it asked for as a result of its arguments

in *Robertson I*. *Id.* at 19. When I read all the contentions advanced by Phillips and put them in the context of the first trial, I reach a very different conclusion. In *Robertson I*, separate theories of tortious interference, fraud, good faith and fair dealing (intentional acts) and negligence, (unintentional acts) were advanced by Robertson. *Robertson I*, 871 F.2d at 1369. Over the objection of Phillips, the jury was permitted to deliberate on punitive damages based upon all of the theories of recovery presented. *Id.* at 1375. We affirmed only the compensatory award on only the theory of tortious interference. *Id.* at 1377. We remanded for retrial on all other theories. We said that on the instructions given and the verdict form submitted, we could not ascertain the basis upon which the jury made its punitive damages decision. *Id.* Phillips advanced this argument and we agreed with the contention. In addition to the reply brief quotations from *Robertson I* set forth in the majority opinion at 18-19 [75a-76a], Phillips also stated as follows:

> The jury fixing the punitive damages award found that Phillips had breached its duty of good faith and fair dealing. Cast in the language of Court's Instruction No. 15 [App. 124], this finding said that Phillips had violated "standards of decency, fairness, or reasonableness" as well as "good faith" and "honesty" in the performance of a contract. Post trial, the District Court recognized that a directed verdict should have been granted on Interrogatory No. 3 [App. 66] because Phillips, having made no contract to brand the Spe-Dee Mart Stores, could not have breached duties of good faith, decency, fairness and honesty owed only by a contracting party. memorandum Opinion, p. 6. Therefore, the jury was permitted to consider breaches of duty defined in the strongest terms (decency, honesty, fairness, and good faith) in arriving at the punitive

> damages award, when those breaches of duty did not exist as a matter of law.
>
> In light of the District Court's judgment NOV, which has not been appealed, Robertson Oil must argue that whatever conduct is left will now support a $5 million punitive damages award; but this result is contrary to law and manifestly unfair to Phillips. It cannot be ascertained what conduct of Phillips was determined by the jury to merit punishment. Some or all of the punitive damages award may have rested upon Phillips' alleged breach of its duties of decency, honesty, fairness and good faith. Therefore, the general verdict on punitive damages must be reversed, error having been shown. *Dudley v. Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986).
>
> In addition, the mere fact that the jury was permitted to assess punitive damages on the basis of negligent conduct should require reversal of the punitive damages award.

Reply Brief of Appellant at 5-6 (footnote omitted).

An argument that portions of the evidence adduced in *Robertson I* could not have supported a punitive damages award and should be separately considered by the jury in its damages determinations on retrial is not, in the least, at odds with the arguments now advanced by Phillips that under the facts of this case two punitive awards are duplicative because, on damages, including punitive damages, all roads do indeed lead to Rome.

Finally, I agree with the district court's analysis of the scope of judicial review of punitive awards under Arkansas practice. Such a review, however, does not, as I have said, save jury awards based upon the faulty Arkansas pattern instruction.

Thus, I would vacate all awards and remand this matter for a new trial on all issues. Short of this, at least a $4,000,000 injustice will have been done.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 90-1451

ROBERTSON OIL COMPANY, INC.,

Appellee,

v.

PHILLIPS PETROLEUM COMPANY,

Appellant.

Submitted Nov. 12, 1990

Decided April 18, 1991

William H. Sutton, Little Rock, Ark., for appellant.

Julius Glickman, Houston, Tex., for appellee.

Before JOHN R. GIBSON and BOWMAN, Circuit Judges, and HANSON,* District Judge.

JOHN R. GIBSON, Circuit Judge.

Phillips Petroleum Company is again before us appealing from a substantial verdict entered against it and in favor of Robertson Oil Company, Inc. After the first trial, we affirmed an award of actual damages based on intentional interference with a business relationship, but remanded for retrial of the claims for fraud and negligence and the claim

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* The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern District of Iowa, sitting by designation.

B. The Eighth Circuit's Holding That The Arkansas Shock The Conscience Standard Of Review Comports With Due Process Conflicts With The Decisions Of The Fourth And Ninth Circuits Concerning The Constitutionally Required Degree Of Scrutiny Of Punitive Damage Verdicts.

In Arkansas, "[t]here is no fixed standard for the measurement of punitive damages." *First Commercial Bank, N.A.* v. *Kremer*, 728 S.W.2d 172, 177 (Ark. 1987). Arkansas juries are told "little more than defendant's net worth and that punitive damages serve to punish and deter." *Union Nat'l Bank of Little Rock* v. *Mosbacher*, 933 F.2d 1440, 1448 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 870 (1992). But despite affording juries this exceedingly broad discretion to punish, Arkansas law requires courts to sustain punitive damage awards, even excessive awards, unless the amount " 'shocks the conscience of the court or demonstrates that jurors were motivated by passion or prejudice.' " *O'Neal Ford, Inc.* v. *Davie*, 770 S.W. 656, 659 (Ark. 1989) (citation omitted). Indeed, " '[a] belief by a trial court that damages are excessive is not, standing alone, a sufficient ground for ordering a reduction [because] if that was the standard, the great discretion of the jury would be abrogated.' " *Id.* Accordingly, to justify a remittitur under the Arkansas shock the conscience test, a punitive damage award must not only be excessive but also " 'totally unsupported' " and "totally out of proportion to the proof." *Shelton* v. *Shelton*, 752 S.W.2d 758, 761 (Ark. 1988).[7]

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[7] The court below found this "broad" standard to be constitutional because Arkansas cases have purportedly "recognize[d] far more specific issues in their analyses" of the size of punitive damage awards. App. 7a. But the "other factors" identified by the Eighth Circuit as saving the Arkansas standard from constitutional infirmity have neither been recognized nor regularly applied by the Arkansas Supreme Court as a necessary component of Arkansas post-verdict review, before or after *Haslip*. *See, e.g., Viking Ins. Co.* v. *Jester*, 836 S.W.2d 371 (Ark. 1992)

In *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), this Court strongly suggested that this kind of review could not survive scrutiny under the Due Process Clause. The Court in *Haslip* upheld the Alabama punitive damage system as constitutional, but in doing so it emphasized the need for an objective, rigorous, two-level post-verdict review process that "ensures meaningful and adequate review by the trial court," *id.* at 20, and requires appellate review that "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and deter its repetition." *Id.* at 21.

The *Haslip* Court endorsed the appellate review standards that the Alabama Supreme Court had previously announced, which included "a comparative analysis" and application of "detailed substantive standards" to determine whether a punitive damage award was excessive. *Id.* at 21. The Court declared:

> This, we feel, distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and in *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988). In those respective schemes, an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive,' or would be considered excessive when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience.'

(affirming $250,000 default judgment for punitive damages in "bad faith" case involving $1,000 compensatory damage award); *Maxwell* v. *Walser*, 751 S.W.2d 351, 353 (Ark. 1988) (upholding punitive award with no analysis because award was not shocking). Nor did the Court of Appeals here even address the extreme deference owed by the courts to Arkansas juries in punitive damage cases. In short, post-verdict review in Arkansas is not a process at all, but merely an exercise in random, utterly capricious *post hoc* rationalization.

Id. at 21 n.10 (citations omitted).[8]

Although the Eighth Circuit's holding that the Arkansas "shock the conscience" standard of review satisfies the due process principles articulated in *Haslip* is consistent with decisions of the Fifth Circuit,[9] it conflicts with the Fourth Circuit's decisions in *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), and *Johnson* v. *Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992) (*en banc*). The Fourth Circuit in *Mattison* held that the South Carolina punitive damage system, as applied by federal courts sitting in diversity, violated the Due Process Clause of the Fifth Amendment. The court noted that the South Carolina "shockingly excessive" standard of appellate review is similar to the Vermont and Mississippi standards criticized in *Haslip*, *see Mattison*, 947 F.2d at 100, 104-05, and found that such review—where "any award except the most extraordinary and shocking, would have to be left standing"—violates "the first principle of due process." *Id.* at

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[8] Although in *Browning-Ferris* this Court declined to address the due process issues relating to punitive damages, 492 U.S. at 277, it did indicate that in diversity cases district courts are "to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered," *id.* at 279, and the district court's determination of these issues is then subject to review by the court of appeals "under an abuse-of-discretion standard." *Id.* As discussed *infra* note 10, the circuits are split over whether the federal courts may, in light of *Haslip*, engage in more exacting scrutiny of punitive damage verdicts than the federal review contemplated by *Browning-Ferris*.

[9] *See, e.g., Eichenseer* v. *Reserve Life Ins. Co.*, 934 F.2d 1377, 1386 (5th Cir. 1991) (holding that Mississippi's "deferential" shock the conscience standard of appellate review is constitutional); *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085, 1095 (5th Cir. 1991) (observing that "Texas courts will overturn an award of damages that is so excessive as to be manifestly unjust" or "is the product of the jury's passion rather than its reason" and holding that Texas standard of review is constitutional), *cert. denied*, 112 S. Ct. 1778 (1992).

105. Moreover, the *Mattison* court observed that "[w]hen the verdict is returned in a federal court and is subject to federal standards of review under Rules 50(b) and 59 [of the Federal Rules of Civil Procedure], no significantly greater restraint is provided." *Id.* at 100. The Fourth Circuit subsequently endorsed and applied the *Mattison* rationale in its *en banc* decision in *Johnson*, striking down application of the Virginia punitive damage system as unconstitutional. 974 F.2d at 1415.

The decision below also conflicts with the Ninth Circuit's decision in *Morgan* v. *Woessner*, 997 F.2d 1244, 1258 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 671 (1994). In *Morgan*, which involved punitive damage claims under both state and federal law, the Ninth Circuit declared that "[i]n *Haslip*, the Court suggested that a 'manifestly and grossly excessive' standard such as the one used by this circuit, does not comport with Due Process." 997 F.2d at 1258. The court therefore "refashioned" its standard of review "to avoid any conflict with the Due Process Clause," *id.*, crafting new procedures that more closely track this Court's analysis in *Haslip* and "adopt[ing] a three-stage approach similar to Alabama's." *Id.* at 1256.[10]

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[10] The circuits not only are in conflict about the degree of trial and appellate review required by *Haslip*, but also disagree regarding whether federal courts sitting in diversity are permitted to engage in such review or instead are limited, as suggested in *Browning-Ferris*, by federal standards of post-verdict review set forth in Fed. R. Civ. P. 50 and 59 as well as the Seventh Amendment right to a jury trial. *Compare Mattison*, 947 F.2d at 99, 108-10 (concluding that federal courts cannot, consistent with the Seventh Amendment, engage in "[a] *Haslip*-type post-trial review, insofar as it is *quasi* de novo" because it would amount to substituting the court's "judgment for that of the jury," and seeking to fashion a more informative jury instruction to counteract the lack of adequate judicial review), *with Morgan*, 997 F.2d at 1255 n.8, 1256-58 (announcing that "it is *Haslip*, not *Browning-Ferris Industries*, that provides the guidance in this volatile area" and adopting *Haslip*-type post-verdict review process), *and Dunn* v. *Hovic*, 1 F.3d 1371, 1381, 1390-91 (3d Cir.) (*en banc*) (explicitly rejecting Fourth

This Court should grant certiorari to clarify the constitutional requirements for judicial review of punitive damages by federal courts in diversity cases. The issue is clearly important,[11] recurring every day in federal courts across the Nation, and it has divided the courts of appeals. The frequency and amount of punitive damage awards have increased dramatically in recent years, *see, e.g., TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2742 (1993) (O'Connor, J., dissenting), significantly burdening the federal judicial system. The disarray among the circuits concerning punitive damage procedures is intolerable, and should be resolved in this case.

C. The Eighth Circuit's Decision Affirming The Imposition Of Two Separate $4,000,000 Punitive Damage Awards Conflicts With The Decisions Of Other Circuits Concerning Duplicative Civil Punishments.

The Court of Appeals' decision affirming the imposition of two separate $4,000,000 punitive damage awards conflicts with the decisions of other circuits, as well as the Arkansas Supreme Court, which have rejected the notion that multiple punitive awards may be imposed where, as here, a single defendant causes a single injury to a single plaintiff. Indeed, while the dissent "searched the reporters for cases affirming dual awards of punitive damages arising out of one core of facts . . . [and] found none," App. 53a, there are "numerous cases both in and out of [the

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Circuit's position in *Mattison* and developing new, more searching standards of appellate review in light of *Haslip* that require, among other things, a comparative analysis of punitive damage awards in similar cases and a determination of whether a punitive award is excessive because duplicative), *cert. denied*, 114 S. Ct. 650 (1993). The need to resolve this disagreement among the circuits provides an additional reason for this Court to grant certiorari in this case.

[11] The Court recently granted certiorari in *Honda Motor Corp.* v. *Oberg*, *cert. granted*, 114 S. Ct. 571 (1994), which presents the question whether Oregon's denial of judicial review for excessiveness of punitive damage awards contravenes the *Haslip* due process principles.

Eighth Circuit] which require a nonduplicative result when exemplary and punitive damages are found under a single core of facts giving rise to compensatory damages." *Id.* 54a (citing, *inter alia, Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d 171, 218 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993); *Stoner* v. *Houston*, 582 S.W.2d 28, 31 (Ark. 1979)).

Thus, for example, the Third Circuit in *Fineman* recently held that it would be "duplicative" to permit the plaintiff to recover punitive damages *and* treble damages because both "serve a penal and deterrent function," 980 F.2d at 219, and the defendant's conduct had caused only a "single loss of future profits." *Id.* at 218. The court concluded that "[s]imply because [plaintiff] was able to wrap that loss into several different legal theories of recovery does not entitle it to recoup twice" or license the infliction of two separate punishments against the defendant. *Id.* The court applied a federal procedural rule requiring the plaintiff to elect one of the two awards to eliminate the duplicative punishment. *Id.* at 219; *see also Kelco Disposal, Inc.* v. *Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir. 1988) (plaintiff required to "elect" between $6,000,000 punitive damage award under tort theory or treble damages and attorney's fees under antitrust law), *aff'd*, 492 U.S. 257 (1989).

At the very least, the Eighth Circuit should have applied that rule here to strike one of the two $4,000,000 punitive damage awards. No matter how many theories of liability can be ascribed to Phillips' conduct, the fact is that—as the Court of Appeals held—" 'the same injury sustained all theories.' " App. 16a. Moreover, it is a routine pleading practice to allege multiple theories of liability in the same case, even though a core set of transactions gives rise to a single injury. The *en banc* Eighth Circuit's decision here will further complicate the litigation of such cases and create a significant risk that defendants will be subjected to multiple, redundant and unfair punishments. Review by

this Court is therefore necessary to examine the due process implications of the arbitrary double punishment in this case and to resolve the conflict among the circuits on this important question.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

March 28, 1994

Respectfully submitted,

ROBERT L. JONES, JR.
JONES, GILBREATH, JACKSON & MOLL
P.O. Box 2023
Fort Smith, AR 72902
(501) 782-7203

WILLIAM H. SUTTON
KEVIN A. CRASS
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Bldg.
400 West Capitol Avenue
Little Rock, AR 72201-3493
(501) 376-2011

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

WILLIAM G. PAUL
NEAL F. LEHMAN
PHILLIPS PETROLEUM COMPANY
1136 Adams Bldg.
Bartlesville, OK 74004
(918) 661-5650

Attorneys for Petitioner

**Counsel of Record*

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 91-3717

Robertson Oil Company, Inc.,

Appellee,

v.

Phillips Petroleum Company,

Appellant.

Submitted: June 8, 1993

Filed: December 28, 1993

Appeal from the United States District Court for the Western District of Arkansas.

Before MCMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN and HANSEN, Circuit Judges, En Banc.

JOHN R. GIBSON, Circuit Judge, with whom HEANEY, Senior Circuit Judge, MCMILLIAN, FAGG, WOLLMAN, and HANSEN, Circuit Judges, join; and with whom MAGILL, Circuit Judge, joins as to Part I.

Phillips Petroleum Company appeals from a district court[1] order refusing to vacate two punitive damage awards—$4,000,000 for tortious interference with a business relationship and $4,000,000 for fraud—after the remand we ordered in *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991). Phillips argues that the district court erred in reviewing the punitive damage awards by applying the Arkansas "shock the conscience" standard because that standard does not constrain the jury's discretion when awarding punitive damages so as to satisfy due process considerations. Phillips also argues that the two $4,000,000 awards are grossly disproportionate, arbitrary, capricious, and fundamentally unfair in violation of due process, duplicative, and an abuse of discretion, and that the jury's deliberations were impermissibly influenced by inflammatory evidence of Phillips' wealth. After a panel of this court affirmed the punitive damage awards, *Robertson Oil Co. v. Phillips Petroleum Co.*, No. 91-3717 (8th Cir. Nov. 18, 1992), we granted Phillips' motion to rehear en banc and vacated the panel opinion. *Robertson Oil Co. v. Phillips Petroleum Co.*, 979 F.2d 1302 (8th Cir. 1992). We received supplemental briefs from the parties and heard arguments, and we again affirm the punitive damage awards.[2]

The case is before this court for the fourth time, and we need not repeat the underlying substantive facts which are set out in our first two decisions: *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368, 1369 (8th Cir.

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[1] THE HONORABLE MORRIS SHEPPARD ARNOLD was United States District Judge for the Western District of Arkansas and was the trial judge in this case. He was appointed Circuit Judge of the United States Court of Appeals for the Eighth Circuit on June 1, 1992. Neither he nor Chief Judge Richard S. Arnold participated in the en banc proceedings in this case.

[2] Judge Magill, joining in Part I of this opinion, concurs in the award of punitive damages for tortious interference with a business relationship only.

1989) (*Robertson I*); and *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991) (*Robertson II*). This court denied rehearing en banc in both *Robertson I* and *Robertson II*.

The first trial in this case resulted in verdicts against Phillips for fraud, negligence, and tortious interference with a business relationship;[3] an actual damage award of $750,000; and a punitive damage award of $5,000,000. *Robertson I*, 871 F.2d at 1369. We affirmed the tortious interference verdict, but reversed the negligence and fraud verdicts as inconsistent. *Id.* We upheld the actual damage award because it was based on only one injury, the loss of the Spe-Dee Mart account, and the tortious interference verdict established Phillips' liability for that injury. *Id.* at 1376. We struck the punitive damage award, however, because a jury must consider the defendant's conduct when it determines the amount to award, and the general verdict form in this case made it impossible for us to determine how much of the punitive damage award was based on the conduct the jury associated with each of its findings of liability. *Id.* We said that "[e]ach of these theories . . . would support a different amount of punitive damages depending upon the conduct involved." *Id.* Some of the punitive damage award may have been based on the conduct underlying the negligence and fraud theories that were reversed. *Id.* Therefore, the case was remanded for retrial of the negligence and fraud claims and the punitive damage award. *Id.* at 1377.

The second trial resulted in a verdict against Phillips on the fraud claim,[4] and punitive damage awards of $4,000,000 for fraud and $4,000,000 for tortious interference. *Robertson II*, 930 F.2d at 1343. Phillips appealed

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[3] The jury also found Phillips liable for breaching the duty of good faith and fair dealing, but the district court overturned this finding.

[4] Robertson retried both the fraud and negligence issues, but elected to submit only the fraud theory to the jury.

again. *Id.* We rejected various claims of error, but because of the intervening United States Supreme Court decision in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S. Ct. 1032 (1991), we remanded with instructions for the district court to consider the propriety of the punitive damage awards under the principles of *Haslip* and Arkansas law. *Robertson II,* 930 F.2d at 1347.

On remand, the district court first analyzed the punitive damage awards under the Arkansas court's "shock the conscience" standard. This standard allows punitive damage awards to stand unless the amount shocks the conscience of the court or demonstrates that jurors were motivated by passion or prejudice. *O'Neal Ford, Inc. v. Davie,* 770 S.W.2d 656, 659 (Ark. 1989). The district court studied the historical development of the "shock the conscience" standard and determined that the standard's "long and distinguished history . . . bears testimony to its utility and constitutionality." *Robertson Oil Co. v. Phillips Petroleum Co.,* 779 F. Supp. 994, 996 (W.D. Ark. 1991). The court then examined Arkansas cases applying the standard and concluded that the Arkansas Supreme Court had enumerated a number of specific inquiries which gave the standard a definite "shape and texture." *Id.* The district court concluded that the standard was not too subjective and that the review criteria and procedures ensured a "meaningful and adequate review by the trial court" as required by *Haslip,* 111 S. Ct. at 1044, and therefore, satisfied due process. 779 F. Supp. at 997. The district court then applied the Arkansas review criteria and allowed the awards to stand. *Id.* at 997-98. The case is now before us again, and the only issue is the propriety of the district court's review of the punitive damage awards under Arkansas law and *Haslip.*[5]

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[5] The dissent would accept a party' motion for rehearing en banc of a decision after a second remand to open up the entire litigation. This we should not do. The dissent's willing acceptance of this oppor-

I.

Phillips advances a multi-faceted argument that the Arkansas "shock the conscience" standard of review does not adequately constrain the discretion of juries to impose punitive damages so as to satisfy due process. Expanding this general argument, Phillips asserts that "standardless" and virtually unlimited jury discretion to punish and highly deferential judicial review of punitive damage verdicts render the Arkansas system constitutionally defective under *Haslip*. Phillips argues that application of the Arkansas standard of malice has been inconsistent and unpredictable, and that there is no fixed standard for the measurement of punitive damages or legislatively defined range. Phillips further argues that there is no reasonable relationship between the compensatory and punitive damage awards. Phillips then launches into a more specific attack on the "shock the conscience" standard, and asserts that federal courts applying Arkansas law have taken a broad brush approach to this standard. Phillips also argues that the Supreme Court approved the punitive damage system in *Haslip* because Alabama limited jury discretion and had a two layered post-verdict review procedure for evaluating the propriety of punitive damages. Finally, Phillips argues that the district court's application of the Arkansas "shock the conscience" standard was constitutionally flawed.

Phillips' broad based arguments fail to recognize the scope and nature of the district court's review of the punitive damage awards and, in truth, fail to recognize the review that Arkansas courts have made of punitive damage awards.

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tunity reveals a different view of the principles of the law of the case which a majority of the judges of this court so firmly endorsed in our order denying rehearing en banc in *Liberty Mutual Insurance Co. v. Elgin Warehouse and Equipment*, 4 F.3d 567, 573 (8th Cir. 1993). Indeed, the dissent would take th' rehearing of *Robertson III* to vacate *Robertson I*, in which we denied rehearing, and vacate *Robertson II*, in which we denied rehearing, and remand the case for a new trial.

When the district court analyzed the punitive damage awards, it first considered the Arkansas "shock the conscience" standard and the question of whether jurors were motivated by passion and prejudice. 779 F. Supp. at 995-96. The court engaged in an historical analysis of the "shock the conscience" standard in Arkansas cases, as well as earlier English cases, and then examined the awards under the standard in *Haslip*. *Id.* at 996-98. The district court observed that the Arkansas Supreme Court has given the "shock the conscience" standard a "definite shape and texture" by engaging in a number of specific inquiries. *Id.* at 996. The district court stated:

> For example, the [Arkansas Surpeme C]ourt has examined the relationship between the relevant parties, the ratio of the punitive award to the compensatory award, the extent and duration of a defendant's acts, the deliberateness of the defendant's acts in the face of no justification for them, the defendant's motives, the defendant's remorse, if any, the defendant's net worth, and other matters, in order to judge the propriety of a punitive award.[6]

Id. at 996-97. Applying these criteria, the district court observed that not one, but two juries had unanimously awarded punitive damages on findings that Phillips had

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[6] The district court cited these Arkansas Supreme Court decisions in support of this enumeration: *Walt Bennett Ford, Inc. v. Keck*, 768 S.W.2d 28 (Ark. 1989); *First Commercial Bank v. Kremer*, 728 S.W.2d 172 (Ark. 1987); *Twin City Bank v. Isaacs*, 672 S.W.2d 651 (Ark. 1984); *Pursley v. Price*, 670 S.W.2d 448 (Ark. 1984); *Matthews v. Rodgers*, 651 S.W.2d 453 (Ark. 1983); *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518 (Ark. 1972); *Holmes v. Hollingsworth*, 352 S.W.2d 96 (Ark. 1961); *Vogler v. O'Neal*, 295 S.W.2d 629 (Ark. 1956); *McGlone v. Stokes*, 104 S.W.2d 191 (Ark. 1937); *St. Louis Southwestern Ry. Co. v. Hagler*, 254 S.W. 1071 (Ark. 1923); *Gordon v. McLearn*, 185 S.W. 803 (Ark. 1916); and *Pine Bluff & Arkansas River Ry. Co. v. Washington*, 172 S.W. 872 (Ark. 1915).

committed two intentional torts, and that the ten-to-one ratio of punitive damages to actual damages did not suggest excessiveness in light of Phillips' net worth. *Id.* at 997. The district court rejected Phillips' assertion that Phillips' net worth triggered passion and prejudice on the part of the jurors, because evidence of net worth had not been allowed until the jury made a finding of liability and fixed the compensatory amount. *Id.* at 998. Finally, the court stated that the nervous and uncertain behavior of Phillips' witnesses could have caused a reasonable fact finder to believe that they were deliberately evasive and had guilty minds. *Id.*

It is evident that the district court considered not only whether the awards shocked the conscience or resulted from passion and prejudice, but also specifically recognized and discussed other factors that numerous Arkansas courts have considered in reviewing punitive damage awards. *Id.* at 996-97. The district court's failure to discuss all the enumerated considerations does not mean that the other factors were not considered. We are satisfied that the district court's analysis properly recognized that although the Arkansas court's "shock the conscience" and passion and prejudice inquiries are broad, the Arkansas cases recognize far more specific issues in their analyses. The district court dealt with a number of the more specific issues, and properly reviewed the issue of punitive damages in light of the Arkansas standards.

Thus, because the district court engaged in a detailed analysis, Phillips' argument that the "shock the conscience" standard does not satisfy due process considerations simply misses the mark. The district court's inquiry was far more specific than this, as is the standard enunciated and the review conducted by Arkansas courts. In our earlier opinions, *Robertson I*, 871 F.2d at 1375-76, and *Robertson II*, 930 F.2d at 1346-47, we discussed the elements underlying punitive damage awards and referred to *Holmes v. Hollingsworth*, 352 S.W.2d 96 (Ark. 1961), and *Ray*

Dodge, Inc. v. Moore, 479 S.W.2d 518 (Ark. 1972). *Ray Dodge* is particularly instructive.

In *Ray Dodge*, the Arkansas Supreme Court concluded that a punitive damage award was based on a finding of legal malice and was not so great as to "shock the conscience" of the court or to indicate passion or prejudice on the part of the jury. 479 S.W.2d at 523. The Arkansas court stated that punitive damages are "the penalty the law fixes for conduct which is malicious, wanton, in violation of a relationship of trust or confidence, or which is done with a deliberate intent to injure another." *Id.* The court emphasized that the punitive damage award must not only "deter similar conduct on the part of the particular tortfeasor," but "must also be sufficient to deter others who might be inclined to engage in such conduct." *Id.* The court observed that although the jury had discretion in fixing the amount of punitive damages, the circumstances in *Ray Dodge* showed the jury had exercised its discretion soundly. The *Ray Dodge* facts indicated that the defendant had committed a deliberate wrong, which, if unpunished, might lead to widespread commercial fraud. *Id.* at 524. The court believed the jury's award was not based on passion and prejudice, but rather evidenced "a legitimate concern for the possible consequences of such a practice" to the general public. *Id.*

The court in *Ray Dodge* then considered particular factors governing the proper amount of punitive damages, including the proportion of punitive to actual damages, the defendant's culpability as shown by the actual damages awarded, the defendant's motives, the degree of calculation involved, and the extent of the defendant's disregard of the rights of others. *Id. Ray Dodge* fleshes out the "shock the conscience" standard with considerable detail.

The district court's analysis in this case covered the same ground as *Ray Dodge* and *Holmes*. In light of the

district court's detailed analysis, Phillips' arguments against the "shock the conscience" standard have no merit.

Like Phillips, we recognize that in *Haslip* the United States Supreme Court considered the Alabama procedures as laid down in recent Alabama Supreme Court decisions, and determined that the procedures for reviewing punitive damage awards met constitutional standards. 111 S. Ct. at 1045. The Alabama court's procedures included requiring the trial court to review the award by considering the culpability of defendant's conduct, the desirability of discouraging others from similar conduct, the impact on the parties involved, and the impact on innocent third parties. *Id.* at 1044. The Alabama court had provided additional checks, first, by engaging in a comparative analysis, and then, by applying substantive standards—considering whether the award exceeded the reasonable amount that would accomplish society's goals of punishment and deterrence. *Id.* at 1045. The Alabama court had indicated that many factors could be considered in determining whether an award was excessive or inadequate:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against

> the defendant for the same conduct, these also to be taken in mitigation.

Id. The United States Supreme Court concluded that these standards imposed a sufficiently definite and meaningful constraint on the discretion of Alabama juries in awarding punitive damages. *Id.* The Supreme Court concluded:

> The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Id.

Although the items the district court considered in this case do not match the *Haslip* factors identically, they coincide for the most part, and insofar as the district court did not consider some of the *Haslip* factors, the record reveals that they were inapplicable. We are satisfied that the district court's review complies with the principles laid down in *Haslip*.[7]

Phillips argues that a number of post-*Haslip* decisions in other circuits require reversal of the punitive damage awards in this case. Each of the cases Phillips discusses, however, was decided before the Supreme Court's *TXO*

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[7] Phillips claims that there is an overlap between the punitive damage awards for fraud and for intentional interference with a business relationship, and thus a dual award. We discuss this issue in Part II.

Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993), decision which was released soon after we heard argument in this case.[8] In *TXO*, the Supreme Court affirmed a West Virginia punitive damage award of $10,000,000 even though the actual damages supporting the award were only $19,000. *Id.* at 2713. The plurality (Chief Justice Rehnquist, Justice Stevens, and Justice Blackmun) again rejected any bright line approach to evaluating punitive damage awards, reiterating that " '[a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.' " *Id.* at 2720 (quoting *Haslip*, 449 U.S. at 18). The Court looked to the facts of the case, including the amount of money potentially at stake, the defendant's bad faith, the overall scheme involved, and the defendant's wealth, and held that even though a drastic disparity existed between the actual and punitive damage awards, the punitive damage award was not "so 'grossly excessive' as to be beyond the power of the State to allow." *Id.* at 2723.

Justice Kennedy concurred in part and in the result, observing that the plurality seemed to rely on a "rational relation between the size of the award and the degree of harm threatened by TXO's conduct." *Id.* at 2725 (Kennedy, J., concurring). Justice Kennedy wrote separately because he found no indication in the record that the jury had evidence regarding "potential harm" when it determined the amount of the award. *Id.* Suggesting that a "manageable constitutional inquiry focuses not on the amount of money a jury awards . . . but on its reasons for doing so," Justice Kennedy considered whether there might be

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[8] *TXO* makes it unnecessary that we further discuss these post-*Haslip* decisions from the other circuits. See our panel opinion for its views on *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991), and *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992).

another explanation for the jury's award. *Id.* at 2725-26. He then decided that the jury was probably motivated by a legitimate concern for punishing and deterring. *Id.* at 2726. He reasoned that the jury found that TXO had committed an intentional tort and that there was evidence of willful and malicious conduct, prior lawsuits alleging similar misdeeds, and argument for the jury to award a large judgment as punishment in light of TXO's wealth. *Id.* at 2726.

Justices Scalia and Thomas also concurred in the result because although " 'procedural due process' requires judicial review of punitive damages awards for reasonableness . . . there is [no] federal constitutional right to a substantively correct 'reasonableness' determination." *Id.* at 2727 (Scalia, J., concurring). Thus, the West Virginia courts' act of reviewing the award satisfied due process. *Id.*

Here, the district court looked to the facts of the case, including the nature of the wrong, the two jury awards, the behavior of Phillips' witnesses, the ratio of punitive to actual damages, and Phillips' net worth, and determined that the awards did not violate due process. 779 F. Supp. at 997-98. According to Justices Scalia and Thomas' opinion, due process was satisfied by the simple fact that the district court reviewed the award. *See TXO,* 113 S. Ct. at 2727. The district court's review also satisfies the plurality and Justice Kennedy's approach, because the district court focused on the particular facts of the case and identified the reasons the jury might have awarded such an amount. *See id.* at 2720-23, 2725-26. In fact, the dissenters (Justices O'Connor, White, and Souter) criticized the trial court's ruling in *TXO* because the trial judge made no findings and did not articulate any reason for concluding that the "amount of damages bore a reasonable or recognizable relationship to actual damages or any other relevant measure." *Id.* at 2740. The West Virginia trial court's deficiency, however, stands in stark contrast to the district

judge's thorough analysis of the award in this case. Here, the district court carefully articulated the reasons for its affirmance. *TXO,* therefore, hurts rather than helps Phillips' position.

Phillips asserts that *Haslip* also dealt with jury instructions and asks us to review the punitive damage instruction given in this case. In *Robertson II,* we held that the instruction given was comparable to that approved in *Haslip,* and that Phillips had waived any defect by failing to offer a more detailed instruction or bring to the court's attention the need for the jury to consider the nature and degree of the wrong—the only *Haslip* factor that was not part of the instruction. *Robertson II,* 930 F.2d at 1347.[9] Phillips invites us to reconsider its argument in light of another panel's later decision in *Union National Bank v. Mosbacher,* 933 F.2d 1440 (8th Cir. 1991), *cert. denied,* 112 S. Ct. 870 (1992). We should not use *Mosbacher's* failure to apply stare decisis principles to reach a contrary result on the instruction and record before us in this case. *See also Benny M. Estes & Assocs. v. Time Ins. Co.,* 980 F.2d 1228, 1234-25 (8th Cir. 1992) (approving the same Arkansas instruction as that given in this case). We decline the invitation to revisit this issue.[10]

Phillips also argues that allowing a jury to consider a defendant's financial worth in determining whether to award punitive damages is constitutionally infirm. Insofar as this issue may be separated from the question of the

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[9] The dissent's tour de force on the punitive damage instructions ends with recognition that the issue has been waived. We respectfully point out that the instruction issues discussed by the dissent were not raised by Phillips in its briefs.

[10] We also observe that Phillips offered its own variation of the Arkansas form instruction, which repeated the standard for awarding punitive damages and allowed the jury to consider its financial condition, just like the instruction given. This record thus prohibits us from reconsidering the constitutional propriety of the instruction.

propriety of the jury instruction, *Haslip* does not prohibit such consideration. Although Alabama juries do not consider financial worth when awarding punitive damages, the plurality in *TXO* recognized that many other states do allow such consideration.[11] 113 S. Ct. at 2723. Moreover, the plurality, Justice Kennedy, and the dissenters agreed that financial worth is a factor that may properly be considered. The plurality noted that "in *Haslip* we referred to the 'financial position' of the defendant as one factor that could be taken into account in assessing punitive damages" *TXO,* 113 S. Ct. at 2723. Justice Kennedy also looked to the arguments made by plaintiff's attorney regarding "TXO's vast financial resources" to support his conclusion that the facts supported the jury's award. *Id.* at 2726. Finally, Justice O'Connor stated that consideration of a defendant's wealth is not unconstitutional, recognizing that wealth has historically been considered relevant in assessing punitive damages, and that "*Haslip* itself suggests that the defendant's wealth is a permissible consideration, although it does so only in the context of *appellate* review." *Id.* at 2737-38 (citations omitted). *TXO* is a complete answer to Phillips' argument on financial worth.

Phillips also questions whether malice supports an award of punitive damages and was properly submitted in this case. In *Robertson I,* we recognized that the jury had been required to find that Phillips intentionally pursued a course of conduct for the purpose of causing harm in an instruction based on the standard for malice established by the Arkansas Supreme Court. 871 F.2d at 1375. The jury in the first trial made such a finding with respect to the tortious interference claim. *Id.* at 1372-73, 1376; *Robertson II,* 930 F.2d at 1344-45. The jury in the second trial was

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[11] *Citing Wagner v. McDaniels,* 459 N.E.2d 561, 564 (Ohio 1984);*Gamble v. Stevenson,* 406 S.E.2d 350, 354, n.3 (S.C. 1991); *Lunsford v. Morris,* 746 S.W.2d 471, 473 (Tex. 1988); *Viking Ins. Co. v. Jester,* 836 S.W.2d 371, 379 (Ark. 1992).

instructed that the jury had made this finding in the first trial. 930 F.2d at 1344 n.1, 1345. The court also instructed the second jury that under the fraud theory Robertson had the burden of proving that Phillips intentionally pursued a course of conduct for the purpose of causing injury or damage.[12] This forthright submission of the issue of malice is a complete answer to Phillips' argument that malice is a flexible issue under Arkansas law.

Although Phillips articulates other reasons in support of its claim that the punitive damage awards are unconstitutional and legally improper, what we have said above adequately disposes of all such arguments.

II.

Phillips next argues that the two $4,000,000 punitive damage awards are duplicative and, therefore, constitutionally excessive. The basic assumption of Phillips' argument is that, although Robertson premised its claims on two separate liability theories, it suffered but a single "inseparable" injury—the loss of the Spe-Dee Mart account—giving rise to punitive damages. The arguments now advanced by Phillips are substantially different from and are fatally undercut by the prior positions it has taken in *Robertson I* and *Robertson II*.

A.

Arkansas, as well as most jurisdictions, follows the rule that an award of compensatory damages must exist before a jury can award punitive damages. *Lake v. Lake*, 562 S.W.2d 68, 69 (Ark. 1978). Phillips argues that there is no compensatory award to support the punitive damages for fraud.

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[12] Instruction No. 16 stated: "In order to recover punitive damages from P...lips, Robertson Oil has the burden of proving that Phillips intentionally pursued a course of conduct for the purpose of causing injury or damage."

We recognized in *Robertson I* that there was only one basis for actual damages underlying all of the liability theories. 871 F.2d at 1376. We stated: "The district court correctly analyzed that all of the liability theories rested upon only one basis for actual damages, the loss of the Spe-Dee Mart account .... We have no quarrel with this analysis." *Id.* We later explained: "the same injury sustained all theories." *Id.* We affirmed the award of $750,000 in actual damages but reversed the $5,000,000 punitive damage award and instructed the district court that it should inform the jury on retrial as to the relationship between the actual and punitive damage considerations. *Id.*

In the second trial, the district court informed the jury that compensatory damages had been awarded and were not to be questioned. 930 F.2d at 1344. Further, the court told the second jury that an appeal had determined that the second jury should decide whether Phillips had defrauded Robertson and, if so, whether Robertson was entitled to punitive damages for fraud. The court instructed that the jury should then decide the amount, if any, Robertson should receive as punitive damages for the intentional interference with contract found by the first jury. The court specifically told the second jury, both at the beginning of voir dire and again before opening statements were made, that:

> In June of 1986, plaintiff sued defendant claiming to have lost one of its best customers, namely Spe-Dee Mart, because of defendant's wrongful conduct. In October of 1987, a jury found that defendant had intentionally interfered with plaintiff's contract with Spe-Dee Mart and returned a verdict in plaintiff's favor in the amount of $750,000.00. This amount was meant to compensate plaintiff for the damages he suffered on account of the loss of the Spe-Dee Mart account. For purposes of this trial you should not question

> the $750,000.00 compensatory award at any time. . . .
>
> After an appeal of this earlier trial to a higher court, it has now been determined that plaintiff is entitled to have a jury decide the amount, if any, of punitive damages to which it is entitled for intentional interference, to decide whether defendant defrauded plaintiff, and, if so, to decide whether plaintiff is entitled to punitive damages for fraud.
>
> For purposes of this trial, you should not question these findings but must accept them as true.

Finally, pursuant to our instructions, the court instructed the second jury that the first jury had found the several elements of intentional interference with contract, including "that Robertson Oil Company was damaged in the amount of $750,000." The court in its instructions continued:

> This amount has already been awarded to Robertson Oil Company for its compensatory damages. You should not, therefore, make any award to compensate Robertson Oil Company for its loss of the Spe-Dee Mart account on either the allegation of fraud or the allegation of intentional interference with contract.

Instruction No. 15.

Thus, the district court made clear to the jury in the second trial that the first jury's award of compensatory damage was the basis for any punitive awards for both intentional interference with contract and fraud.

In the second as well as the third appeal to this court, both of which followed the second trial, Phillips made extended arguments with respect to the propriety of the instructions given concerning the first trial, and the pro-

priety of the separate $4,000,000 punitive damages awards. *See Robertson II,* 930 F.2d at 1344-47. Phillips, however, never argued that there was not an award of compensatory damages underlying the award of punitive damages for fraud. Of greater significance is that after the dissent in *Robertson III* objecting to the punitive damage award for fraud on the ground that there was no supporting award of compensatory damages for fraud, Phillips did not argue the dissent's position in either its motion for rehearing en banc or in its supplemental briefing to the en banc court.

It is clear that the first jury's determination of $750,000 in compensatory damages is now supported by the first jury's finding of intentional interference and the second jury's finding of actionable fraud.

B.

We now turn to Phillips' argument that the two $4,000,000 punitive damage awards are duplicative.

In *Robertson I,* we first stated that "all of the liability theories rested upon only one basis for actual damages." 871 F.2d at 1376. We then looked to Arkansas Supreme Court decisions holding that an assessment of punitive damages involves consideration of: the nature, extent, and enormity of the wrong; the intent of the party committing the wrong; and the general circumstances of the particular transaction involved, including any mitigating circumstances, and the financial and social condition and standing of the parties. *Id.* at 1375-76. We recognized that the amount of actual damages is one indication of the "culpability of the defendant." *Id.* at 1376 (quoting *Ray Dodge,* 479 S.W.2d at 523-24). We concluded:

> The conduct of Phillips relevant to an award of punitive damages necessarily differs according to the various theories of liability on which the jury based its verdict.

. . .

> As we have explained above, the conduct of a defendant determines the amount of punitive damages. The tortious interference with a business relationship, fraud, and good faith and fair dealing theories, all intentional torts which support the punitive damage award, each involve different conduct. Each of these theories therefore would support a different amount of punitive damages, depending upon the conduct involved.

Id.

This holding is the law of the case.[13] Further, the holding was the basis for instructions on damages given in the second trial, and is the foundation upon which we must consider Phillips' argument as to whether the two punitive awards were duplicative.

At the second trial, the court instructed the jury that an earlier jury had found that Phillips tortiously interfered with a contractual relationship and authorized the jury to award punitive damages on this theory. The court defined the elements of fraud to the jury, and instructed the jury that it could award punitive damages on the fraud theory. The court submitted special interrogatories to the jury, and the jury awarded $4,000,000 as punitive damages on each of the theories.

Considering the awards under principles of Arkansas law we have recited above, the actual damages are identical under each of the theories submitted to the jury.

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[13] Seven judges of this court, denying rehearing en banc in *Liberty Mutual Insurance Company*, 4 F.3d at 567, resoundingly affirmed the importance of the law of the case principle. The dissent's argument that the punitive awards are duplicative proceeds from its rejection of *Robertson I* as incorrectly decided. The dissent thus ignores the clearly expressed views of a majority of the judges of this court. Indeed, even Phillips does not now ask us to revisit the holding in *Robertson I*.

Similarly, the financial and social condition and the standing of the parties are identical with respect to both punitive damage awards.

On the other hand, the nature, extent, and enormity of the wrong, the intent of the party committing it, and the general circumstances attending the particular transaction involved, differ with respect to each of the two punitive awards. These differences are evidenced by the specific jury instructions on the tortious interference with contract[14] and fraud claims.[15] The enumeration of the elements of the two claims in the instructions made abundantly clear to the jury the differing nature of the wrongs.

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[14] The court instructed the jury that the previous jury had found the following elements of the tortious interference with contract claim:

> First, that there was a valid contract between Robertson Oil Company and Spe-Dee Mart; second, that Phillips Petroleum knew of that contract; third, that Phillips intentionally interfered with that contract by inducing or causing its termination; fourth, that with respect to intentional interference with contract, Phillips was not acting in its own fair interest based upon reasonable economic and business considerations, but with an intent to cause injury or damage to Robertson Oil Company.

[15] The jury was required to find the following elements in order to return a verdict for Robertson on the fraud claim:

> First, that Phillips made false statements of material fact to Robertson Oil; second, that Phillips knew or believed that the statements were false or lacked a sufficient basis of information to make the statement; third, that Phillips intended to induce Robertson Oil to act or to refrain from acting in reliance on the statements; fourth, that Robertson Oil justifiably relied on the statements in acting or refraining from acting; and fifth, that the actions of Phillips were a proximate cause of damages to Robertson Oil.

The fifth element necessarily found by the jury causes us to conclude that the dissent's statement that there has been no valid determination by the second jury that Robertson suffered compensable damages from fraud, dissent at page 43, is plainly incorrect.

With respect to Robertson's claim for punitive damages, the court instructed the jury that it must find that Phillips "intentionally pursued a course of conduct for the purpose of causing injury or damage." The court also instructed that the purpose of punitive damages was "to punish a wrongdoer and to deter others from similar conduct." These aspects of the punitive damage instruction relate directly to the nature, extent, and enormity of the wrong and the intent of the party committing the wrong. It is evident that the jury's deliberations were directed to two different torts and two different types of conduct, each of which supports an award of punitive damages.

There is one further element in the equation. In the first appeal, Phillips argued against the single punitive damage award returned in the first trial, taking the position that there were in fact two separate injuries. Phillips' reply brief in *Robertson I* argues that there are two bases for punitive damages:

> The punitive damages award herein is in the form of a general or "global" verdict. It is impossible to apportion the award among the various theories of liability found by the jury, because none of the liability interrogatories refer to punitive damages, but only to "damages" in general, *and neither of the punitive damages interrogatories are (sic) tied to specific torts.* (emphasis supplied)
>
> Punitive damages are not intended to compensate an injured party, but to punish and deter conduct of the offending party. Therefore, the existence and size of an award of punitive damages depends upon the conduct of the defendant, not upon the loss to the plaintiff. The loss to Robertson Oil reflected in the compensatory damages interrogatory has no bearing on the punitive damages award.

Phillips' argument continues and makes specific the two differing timeframes of the conduct that might support punitive damages:

> Phillips' relevant conduct differs according to the various theories of liability affirmatively answered by the jury. The key conduct on the tortious interference count allegedly occurred during the meeting between the Phillips representatives and Spe-Dee Mart. However, Phillips' relevant conduct on the fraud, negligence and bad faith counts occurred prior to that time, i.e., in the period up to the October, 1984 meeting between Phillips and Robertson Oil. Yet the jury was permitted to assess punitive damages on every action of Phillips from May through October, 1984, i.e., on *all* conduct of Phillips which supported *all* of the elements of *all* of the causes of action represented by interrogatories Nos. 2-5.

To accept Phillips' argument that both punitive damage awards spring from but one injury requires that we reach a conclusion totally at odds with that embraced by Phillips in the first appeal, a conclusion which led to our holding that separate elements are to be considered in awarding punitive damages, depending upon the nature of the tort involved. *Robertson I,* 871 F.2d at 1376. Although we affirmed only a single award of actual damages in *Robertson I,* we held that the wrongs giving rise to punitive damages involved different conduct and each would support a different amount of punitive damages. In a sense, as Robertson argues, Phillips got what it asked for in the second trial, namely, separate consideration of the punitive damage issue with respect to each specific tort and a separate award by the jury. Phillips is bound in this litigation by the position it took in the first appeal, and its argument that there are duplicative punitive damage awards is most effectively answered by the arguments it asserted in the first appeal. Under these circumstances, we do not believe

that the common factors in the two punitive damage awards—namely the amount of actual damages for the single injury and Phillips' net worth—are sufficient to justify a different conclusion.

The jury instructions and the jurors' answers to the interrogatories show that the jury based its punitive damage awards on two separate patterns of conduct.[16] Phillips also has divided the conduct subject to punitive damages into two distinct timeframes, the day of the meeting, and the five-month period leading up to that meeting, a division which is consistent with our discussion in *Robertson I.* 871 F.2d at 1369-71.

Here, although there was a single compensatory injury (the loss of the account), there were two separate wrongful courses of conduct supporting the punitive damage awards involving different timeframes.

The record is silent as to whether Phillips requested a cautionary or limiting instruction to guard against the jury considering overlapping conduct on each of the two punitive damage claims. It should have been evident that by submitting two specific claims for punitive damages on two different theories the potential existed for this to occur.

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[16] This case differs from *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987), in which this court held that the defendants had injured Holmberg only once and, accordingly, should be punished only once. *See id.* at 212. Similarly, the case differs from *Superturf, Inc. v. Monsanto Company*, 660 F.2d 1278 (8th Cir. 1981), in which the duplication was found between a treble damage award under antitrust statutes and a punitive damage award for tortious interference with business. *See id.* at 1283. *Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979), is distinguishable for the same reason. *See* 582 S.W.2d at 30-31. While Minnesota law does not control this case, the decision of the Court of Appeals of Minnesota in *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670 (Minn. Ct. App. 1991), is also factually distinguishable. That court concluded that the jury assessed its punitive damage award on the same misconduct which the trial court punished by assessing a civil penalty. *Id.* at 678.

Further, we do not know whether Phillips raised the question of duplication before the district court. Certainly, it was not discussed in the district court order, and such an argument was not pressed in the second appeal of this case. *See Robertson II,* 930 F.2d at 1342.

We conclude that the punitive damage awards are not duplicative. Each of the jury awards was approximately five and one-third times the actual damage award. The two together are approximately eleven times the actual damage award. On the record before us, we do not believe that such an amount is sufficient to shock the judicial conscience or to demonstrate that the jury was motivated by passion and prejudice. As the district court observed, strong issues of credibility arose in the trial of the case. The district court specifically commented that a reasonable factfinder could have thought Phillips' principal witnesses were deliberately evasive and that they had guilty minds. Under such circumstances, we should not disturb the jury verdict, and we do not believe that *Haslip,* 111 S. Ct. 1032, or *TXO,* 115 S. Ct. 2711, or due process principles require us to do so.

We affirm the judgment of punitive damages for fraud in the amount of four million dollars, and for intentional interference with contract in the amount of four million dollars.

BEAM, Circuit Judge, dissenting, with whom BOWMAN and LOKEN, Circuit Judges, join, and with whom MAGILL, Circuit Judge, joins as to Parts II C and D.

After considering this case four times, this court now affirms two separate $4,000,000 punitive damage awards arising from a single compensable injury. I dissent.

Without serious contradiction from any party or any judge involved in this case, the single compensable event in this dispute was the purported loss by Robertson of its Spe-Dee Mart account. And, at the first trial in this matter, the co-owner of Spe-Dee Mart testified that within two months after the activities at issue in this litigation, Robertson would have lost the account anyway because of Spe-Dee Mart's acceptance of a direct petroleum jobbership (the same status held by Robertson) offered by Unocal, one of Phillips' competitors. In fact, Spe-Dee Mart had been searching for such an arrangement since 1971. Trial I Transcript, Vol. 2 at 31. [1] So, for a two-month period of lost "branding,"[2] the jury compensated Robert-

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[1] Indeed, at the second trial, Stanley Greenwood, general manager and co-owner of Spe-Dee Mart Stores testified as follows:

> [Jones (for Phillips):]
>
> And even if you had been branded Phillips by Butch Robertson, through Butch Robertson by Phillips, if an opportunity came along where you could have gotten a direct contract with a major oil company to become a jobber yourself, you would have done that?
>
> [Greenwood:]
>
> I would have accepted the jobbership, yes.

Trial II Transcript, Vol. 2 at 194. The evidence establishes that such an opportunity came along in December 1984 which resulted in Spe-Dee Mart becoming a Unocal jobber in January 1985. *Id.* at 182. The meeting at which Phillips purportedly interfered with Robertson's relationship with Spe-Dee Mart occurred in October 1984. *Id.* at 107.

[2] Before this litigation began, Spe-Dee Mart, an independent marketer, was already receiving Phillips' products through Robertson. It

son with a $750,000 actual damages award, an amount affirmed by a panel of this court. *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989) (*Robertson I*). This court now endorses an additional $8,000,000 in punitive damages for Robertson. It is no wonder that the Supreme Court recently voiced its concern "about punitive damages that 'run wild.' " *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

I. PROCEDURE

Before addressing the substantive issues, I consider two procedural matters. They present separate but interrelated concerns.

This court states that "the case is now before us again [en banc], and the only issue is the propriety of the district court's review of the punitive damage awards under Arkansas law and *Haslip.*" *Supra* at 4. I disagree. The court also mentions that rehearing en banc was denied in both *Robertson I* and *II*. *Supra* at 2. Since we now consider the case en banc, this latter point is immaterial. However, both of these statements merit discussion.

A. Matters Before the Court

The court apparently makes its "only issue" statement in reliance on decisions made by panels of this court in earlier appeals which it labels *Robertson I, Robertson II*

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simply sought to have its retail outlets "branded" through use of Phillips Petroleum Company signs, logos and credit cards. Robertson claims that Phillips refused Robertson's request that all Spe-Dee Mart stations be "branded," causing Spe-Dee Mart to quit doing business with Robertson. However, Spe-Dee Mart continued to receive Phillips' products through Robertson after the events giving rise to litigation and up to the time it commenced its relationship with Unocal. Trial II Transcript, Vol. 2 at 207-08.

and *Robertson III*.[3] *Supra* at 2. (I will also use these designations.) This approach is based upon a "law of the case" argument. *See supra* at 18-19 [18a-19a] and n.13. That is, all issues that were decided in *Robertson I* and *Robertson II* are not now susceptible to consideration by the court en banc since we rejected en banc review after *Robertson I* and *Robertson II*.

In the usual course of events, when a suggestion for rehearing en banc is granted, the panel opinion is vacated. Without citing authority, the court assumes that only the last panel opinion in this case is vacated and only that panel's holding is before the en banc court for review. While this may be the proper analysis for a matter of continuing concern in the district court like, for instance, a school desegregation case, such a course does not follow when we deal en banc with a case that has presented the same set of facts and the same issues and disputes in each of three appeals. We are dealing here with issues that were not satisfactorily resolved in the earlier appeals and which impact the present appeal.

The latest order involved in this en banc appeal is the *Robertson III* affirmance of $750,000 in compensatory damages and dual awards of punitive damages. The procedural history of this case is complex. In *Robertson I*, the panel remanded for a partial new trial. Phillips appealed from the retrial. This resulted in the *Robertson II* opinion in which the panel ordered a *Haslip* analysis of the $8,000,000 (dual $4,000,000) punitive award. When the case returned to this court after the *Haslip* review, as *Robertson III*, far more than a dispute over the *Haslip* analysis remained in the case. The dual awards issue clearly remains and this,

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[3] *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989) (*Robertson I*); *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991) (*Robertson II*); *Robertson Oil Co. v. Phillips Petroleum Co.*, No. 91-3717, 1992 U.S. App. LEXIS 30,167 (8th Cir. Nov. 18, 1992) (vacated) (*Robertson III*).

of necessity, encompasses the retrial procedure through which the awards came about. This is shown by the suggestions for rehearing en banc from which our en banc consideration emerges. Phillips raised the following questions:

> 1. Whether a defendant may be subjected to two separate punitive damage awards in the same case based on two different theories of tort liability that are predicated on the same core act of the defendant and where the defendant's conduct has resulted in a single injury to the plaintiff and a single compensatory damage award.
>
> 2. Whether the Arkansas process by which punitive damages are imposed, assessed and reviewed is invalid under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution because that process permits juries to punish defendants based on their wealth and does not contain sufficiently definite or constitutionally meaningful standards.
>
> 3. Whether the excessive, duplicative and disproportionate nature of the two $4,000,000 punitive damage awards violated Phillips' constitutional due process rights.
>
> 4. Whether federal courts in diversity cases must apply federal, rather than state, excessiveness standards and are precluded by the Seventh Amendment from engaging in the kind of rigorous judicial review of punitive damage verdicts contemplated by *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044-46 (1991), and therefore must instead fashion particularly detailed and objective punitive damage jury instructions to comport with due process.

Petition for Rehearing and Suggestion for Rehearing En Banc (*Robertson III*) at ii-iii.

There can be little question that our grant of rehearing en banc must vacate those parts of all previous panel opinions which deal with the matters raised by Phillips in its suggestion for en banc review. That would include, at least, portions of the panel opinions in *Robertson II* and in *Robertson III*.

In any event, whatever was specifically vacated by our grant of en banc consideration, "sitting *en banc*, we may overrule any panel decision that a majority of the active judges believes [was] wrongly decided, unless a party would be seriously prejudiced as a result." *Van Gemert v. Boeing Co.*, 590 F.2d 433, 437 n.9 (2d Cir. 1978). The doctrine of law of the case is properly applied only to the district court and to other panels of the court of appeals. *Id.* It cannot be used to immunize a decision from review by the court en banc. *Id.; see also Watkins v. United States Army*, 875 F.2d 699, 704-05 n.8 (9th Cir. 1989) (law of the case doctrine does not prevent the court which rehears a second appeal en banc from overruling the decision of the panel that decided the first appeal), *cert. denied*, 498 U.S. 957 (1990); *Shinman v. International Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984) (law of the case doctrine does not impair the power of an en banc court to overrule any panel decision), *cert. denied*, 469 U.S. 1215 (1985); *Lincoln Nat'l Life Ins. Co. v. Roosth*, 306 F.2d 110, 114 (5th Cir. 1962) (on a second appeal, the court en banc has the power to reexamine any prior panel decision), *cert. denied*, 372 U.S. 912 (1963).

Similarly, the en banc court has the power to overrule panel decisions in cases other than those before the court for en banc review. *See, e.g., United States v. Wise*, 976 F.2d 393, 401 (8th Cir. 1992) (en banc) (overruling panel holdings in *United States v. Fortier* and *United States v. Streeter*); *United States v. McKines*, 933 F.2d 1412, 1426 (8th Cir.) (en banc) ("insofar as our earlier [panel opinions] may be to the contrary, they should not be followed"),

cert. denied, 112 S. Ct. 593 (1991). If this were not so, any prior panel decision would be locked in stone and could not be modified by an en banc court. I find no case in this or any other circuit that has adopted that position. Such a posture is particularly untenable in a case like this where we deal with one core of operative facts and one compensatory injury.

This circuit has not held to the contrary in circumstances comparable to these. In *Liddell v. Missouri,* 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied sub. nom., Leggett v. Liddell,* 469 U.S. 816 (1984), the St. Louis school desegregation case, this court invoked the law of the case doctrine in dealing with previously decided questions on interdistrict student transfers. *Liddell,* 731 F.2d at 1304. However, the principal prior decision on the transfers at issue, *Adams v. United States,* 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied,* 449 U.S. 826 (1980), was an en banc decision. *Liddell,* 731 F.2d at 1302. Even so, in *Liddell,* the author of the court's present opinion, who also authored the opinions in all three *Robertson* panel appeals, stated:

> The Court declares that we are bound by our previous holdings as to interdistrict transfers. The law of the case doctrine, however, applies with less force to prior decisions of a panel. *Van Gemert v. Boeing Co.,* 590 F.2d 433, 436-37 n.9 (2d Cir. 1978); *aff'd,* 444 U.S. 472, 100 S. Ct. 745, 62 L.Ed.2d 676 (1980); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478 at 796-97. Resting as it does on the precarious comparison with *Hills,* even if the issue were firmly established by *Liddell V,* the Court en banc should attempt to decide the case correctly rather than consistently. *See Robbins, et al. v. Prosser's Moving & Storage Co.,* 700 F.2d 433, 438 (8th Cir. 1983); *United States v. Unger,* 700 F.2d 445, 450 n.10 (8th Cir. 1983); *Wrist-*

Rocket Manufacturing Co. v. Saunders Archery Co., 578 F.2d 727, 730 (8th Cir. 1978).[4]

Liddell, 731 F.2d at 1331 (Judge John R. Gibson, dissenting in part).

This statement reflects the correct policy to be followed in this and every other case. Outside of the context of a school desegregation (or similar) case in which the district court maintains continuing jurisdiction and day-to-day supervision over evolving adverse issues, Judge Gibson's statement in *Liddell* is (or should be) the law of this circuit. Sitting en banc, we should, indeed, attempt to decide a case "correctly rather than consistently."

B. Earlier Denials of En Banc Review

The fact that we denied en banc review of the panel opinions in *Robertson I* and *Robertson II* does not insulate them, if they were wrongly decided, from reversal now. The court's statement concerning en banc review reflects, as earlier indicated, immaterial acts insofar as this en banc proceeding is concerned. Denial of a petition for en banc review has no precedential value and does not establish law of the case. *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991).

There are numerous reasons for voting to deny rehearing en banc other than agreement with a panel opinion. This is especially true when, as in this matter, the case

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[4] The case on which Judge John R. Gibson relied, *Van Gemert v. Boeing Co.*, 590 F.2d 433 (2d Cir. 1978) (en banc), is procedurally similar to this case. After consideration by three panels (*Van Gemert I*, 520 F.2d 1373 (2d Cir. 1975); *Van Gemert II*, 553 F.2d 812 (2d Cir. 1977); and *Van Gemert III*, 573 F.2d 733 (2d Cir. 1978)) the court reheard the case en banc. Boeing presented a "law of the case doctrine" argument premised on earlier panel decisions. The en banc court rejected the argument saying "sitting *en banc*, we may overrule any panel decision that a majority of the active judges believes was wrongly decided." *Van Gemert*, 590 F.2d at 437 n.9.

is being remanded for further activity in the district court. Federal Rule of Appellate Procedure 35 and Eighth Circuit Rule 35A disfavor and discourage en banc consideration and limit such occurrences to cases that present issues of grave constitutional dimension or exceptional public importance. Matters which come to the federal courts under diversity jurisdiction, as here, usually fit neither of these molds.

II. DISCUSSION

I now turn to the matter of deciding the case correctly. This involves four points, only three of which ultimately affect the outcome of this litigation.

A. Punitive Damages Instruction

At the first trial, the district court instructed the jury as follows:

> In addition to compensatory damages for any actual loss that Robertson Oil Company may have sustained, it asks for punitive damages from Phillips. Punitive damages may be imposed to punish a wrongdoer and to deter others from similar conduct. In order to recover punitive damages from Phillips, Robertson Oil Company has the burden of proving that Phillips *intentionally pursued a course of conduct for the purpose of causing damage.* You are not required to assess punitive damages against Phillips Petroleum Company, but you may do so if justified by the evidence.

Trial I Transcript, Vol. 5 at 82-83 (emphasis added).

At the retrial, the instruction stated:

> In addition to compensatory damages for the actual loss that Robertson Oil sustained and has already recovered, it asks for punitive damages

> from Phillips for both intentional interference with contract and fraud. Punitive damages may be imposed to punish a wrongdoer and to deter others from similar conduct. In order to recover punitive damages from Phillips, Robertson Oil Company has the burden of proving that Phillips *intentionally pursued a course of conduct for the purpose of causing injury or damage.*

Trial II Transcript, Vol. 3 at 208 (emphasis added).

At the second trial, the district court further stated with reference to recovery of punitive damages:

> I instruct you that as to the claim of intentional interference with contract, Robertson Oil has met that burden. It is for you to decide whether Robertson Oil has met that burden as to the claim of fraud.

Id.

The general punitive damages instruction is patterned after the second of two alternative instructions set out in Arkansas Model Jury Instruction (AMI) 2217.[5] The first

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[5] Arkansas Model Jury Instruction (AMI) 2217 states as follows:

> In addition to compensatory damages for any actual loss that _____ may have sustained, he asks for punitive damages from [*defendants*]. Punitive damages may be imposed to punish a wrongdoer and to deter others from similar conduct. In order to recover punitive damages from [*defendants*], _____ has the burden of proving [either, first]:
>
> [That _____ knew or ought to have known, in the light of the surrounding circumstances, that his conduct would naturally and probably result in (injury) (damage) and that he continued such conduct (with malice or) in reckless disregard of the consequences from which malice may be inferred]
>
> [Or, second]
>
> [That _____ intentionally pursued a course of conduct

instruction, not used in this case, expressly requires a finding of malice.[6]

The language of the Robertson (AMI) instruction raises two somewhat related inquiries. The first question is whether evidence of an intentional tort, alone, is enough to permit submission of punitive damages to the jury. The second query is whether the "intentionally pursued . . . conduct for the purpose of causing damage" language adequately guides the jury in finding the elements necessary for an award of punitive damages. I believe that use of the punitive damages instruction in this case is both contrary to Arkansas law and unconstitutional under the holdings of *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

1. Sufficiency Under Arkansas Law

There is no doubt that the district court regarded evidence of any intentional tort sufficient to submit the issue of punitive damages to the jury.[7] At the first trial the

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for the purpose of causing (injury) (damage)]

[Or both].

[In arriving at the amount of punitive damages you may consider the financial condition of _____, as shown by the evidence.] You are not required to assess punitive damages against _____ but you may do so if justified by the evidence.

[6] Although the comment to the AMI instruction refers to use of the second instruction "in an intentional tort case," AMI 2217 Comment ¶ 1, cases cited in the comment merely hold that the then-existing AMI 2217 was to be used in a negligence case and was not to be used in an intentional tort matter. *See Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584 (Ark. 1979); *Tandy Corp. v. Bone*, 678 S.W.2d 312 (Ark. 1984).

[7] At the first trial, the district court initially stated, "I think the test [for punitive damages] under Arkansas law, which is presumably applicable here, requires willful and wanton behavior or repeated reckless

district court gave this instruction on intentional interference with a business expectancy:

> Interrogatory No. 4. Do you find from a preponderance of the evidence that Robertson Oil Company had a business relationship or expectancy with the Spe-Dee Mart stores; that Phillips Petroleum Company had knowledge of Robertson Oil's relationship or expectancy with the Spe-Dee Mart stores; that Phillips *intentionally and improperly interfered with that relationship;* and that Robertson Oil suffered damages which resulted from Phillips Petroleum's intentional and improper interference? You will answer that question "yes" or "no."

Trial I Transcript, Vol. 5 at 76. (Emphasis added). The jury at the first trial found that Phillips had committed this intentional tort. *Id.* at 143. The panel in *Robertson I* affirmed this finding but reversed the punitive damages award because it could not ascertain that the jury had used an intentional tort as the basis for such award. *Robertson I,* 871 F.2d at 1377. On retrial, the district court instructed the second jury, as indicated above, that the "claim of intentional interference with contract" found by the first jury meets the burden "of proving that Phillips intentionally pursued a course of conduct for the purpose of causing injury or damage." Trial II Transcript, Vol. 3 at 208. With this, the jury was effectively directed to

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acts from which malice can be inferred." Trial I Transcript, Vol. 5 at 7. The court then examined the AMI and concluded that the test "doesn't require malice or willful or wanton conduct. It requires that someone intentionally pursue a course of conduct with the purpose of causing injury. Willful and wanton and malice haven't got anything to do with the intentional tort according to this new [AMI] instruction." *Id.* at 8. Then, at the second trial, the district court states again, "if you have an intentional tort proved up, that that alone is sufficient to make a submissible case on punitive damages to the jury." Trial II Transcript, Vol. 2 at 238.

consider only the amount of punitive damages arising from that intentional tort. Likewise, the second jury was told that a simple finding of fraud, another intentional tort, was sufficient for them to consider a second award of punitive damages. The punitive damages instruction contained no requirement of malice or recklessness or wantonness.[8] *Id.* This was error.

Arkansas law does not support use of a punitive damages instruction solely upon evidence of an intentional tort. In a case involving an action for breach of contract, the Arkansas Supreme Court stated that a bare showing of intentional misuse of insurance premium payments and an untrue representation that the insurance sought had been purchased would not justify punitive damages. *McClellan v. Brown*, 632 S.W.2d 406, 407 (Ark. 1982) ("we must always consider circumstances other than the wrongdoer's intention to do what he did, in order to determine whether punitive damages are appropriate"). In *Viking Ins. Co. v. Jester*, 836 S.W.2d 371 (Ark. 1992), an action for bad faith in settling an insurance claim, the Supreme Court of Arkansas approved a punitive damages instruction that required a finding that the defendant "engaged in affirmative misconduct which was dishonest, malicious, or oppressive." *Id.* at 379. The approved instruction also states that "[a]ctual malice is that state of mind in which a person's conduct is characterized by hatred, ill will, or a spirit of revenge, actual malice need not be proved but may be inferred from conduct and surrounding circumstances." *Id.* Thus, *Viking Insurance*, a post-*Haslip* decision, clearly un-

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[8] Arguably, the requirement of malice is contained in the statement "intentional pursuit of conduct for the purpose of causing harm", which is the definition of malice. *See* Black's Law Dictionary 862 (6th ed. 1990). The fallacy of that argument here is that no jury ever found that Phillips pursued the tortious conduct *for the purpose of causing harm*. The jury merely found that Phillips intentionally interfered with a contractual relationshp and caused harm. Thus, the malice requirement has not been met.

dermines the validity of the punitive damages instruction given in this case.

The only Arkansas case that even arguably stands for the proposition that evidence of an intentional tort is sufficient, by itself, to support a jury inquiry on punitive damages is *Bruns v. Bruns*, 719 S.W.2d 691 (Ark. 1986). In *Bruns*, a spousal battery case, the Supreme Court of Arkansas stated that "[p]unitive damages are recoverable when there is an intentional violation of another individual's rights." *Id.* at 694. However, the Arkansas Supreme Court also expressly noted the existence of proof, as a matter of law, that Bruns was guilty of intent, willfulness, wantonness or conscious indifference from which malice could be inferred. *Id.* In its present opinion, the court relies heavily on *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518 (Ark. 1972). *Supra* at 7-8 [7a-9a]. However, that case also supports the proposition that malice is required for imposition of punitive damages in Arkansas. In *Ray Dodge*, the Arkansas Supreme Court stated, "[i]f, then, there was evidence tending to show that appellant intentionally performed a deliberate act with the intention of misleading a prospective purchaser about a material matter to his injury, it was proper to permit the jury to consider the award of exemplary or punitive damages." *Id.* at 522. The Arkansas Supreme Court noted, however, that "there was sufficient evidence to support a finding of legal malice." *Id.* at 523.

In any event, it is clear from these Arkansas cases that evidence of or the bare finding of an intentional tort is not sufficient to trigger deliberations on punitive damages. Giving Robertson the benefit of every reasonable inference from the record, I find no evidence of malicious, oppressive, or outrageous conduct on the part of Phillips to support a punitive damages instruction in this case.[9] At the

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[9] This dearth of evidence was not lost on the district court. At the

least, if the district court were to submit the issue of punitive damages to the jury, it should have been submitted with an instruction requiring a finding of malice in accord with Arkansas law.

2. Constitutionality

Assuming for the sake of argument that the instruction used in this case comports with Arkansas law, the instruction violates the Constitution. In *Haslip*, the defendant argued that the punitive damages instruction violated the due process clause because it failed to properly guide the jury. The Supreme Court "concede[d] that unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Haslip*, 499 U.S. at 18. When a case is tried to a jury, adequate guidance from the court must be a factor in the constitutional calculus. *Id.* Of course, this guidance must come from the instructions given by the trial judge.

The Supreme Court noted that among the factors "appropriate for the trial court's consideration [is] the culpability of the defendant's conduct." *Id.* at 20 (quotations omitted). The Supreme Court translated this factor into a requirement of specific restraint on jury discretion, requiring the jury to consider "the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct" before awarding punitive damages. *Id.* at 21. The district court's instruction that the jury must find merely that Phillips "intentionally pursued a course of conduct for the purpose of causing injury or damage," falls short of the requirements set forth in *Haslip*. By comparison, in reviewing the fraud findings in *Haslip*, the Supreme Court of Alabama found that "given [the] facts, the conclusion is ines-

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first trial, at the close of plaintiff's case, the district court stated "I'm not inclined to think that there's been much of a case been made out for punitive damages." Trial I Transcript, Vol. 2 at 210.

capable that the fraud was intentional, gross, oppressive and malicious." *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 540 (Ala. 1989) (quotation omitted).

Thus, after *Haslip*, it is clear that an adequate jury instruction must, at least, require a finding of malice or something reasonably akin to it.[10] The Robertson instruction did not and was unconstitutional.

3. Waiver

In spite of the above analysis, I find that Phillips' recent claims with regard to the wording of the instruction must fail. Phillips objected to the sufficiency of the evidence for the submission of the issue of punitive damages to the jury. With this objection, I agree. However, I have fully examined the record and I find no specific objection by Phillips to the language of the instruction given by the trial court, either with respect to its failure to comport with Arkansas law or its constitutionality. While general constitutional claims were made at the conference on jury instructions, they fell short of raising the specific "guidance" issue raised in *Haslip* and discussed but not reached in *TXO*. I am convinced that a punitive damages instruction worded as set forth in the second instruction of AMI 2217 is unconstitutional. Its demise, however, must await

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[10] A finding of actual or legal malice is required for imposition of punitive damages in all other states in the Eighth Circuit tht allow punitive damages. *See Bismark Realty Co. v. Folden*, 354 N.W.2d 636, 643 (N.D. 1984) (a specific finding of actual or presumed oppression, fraud or malice and not merely intentional or willful conduct is required; a finding of bad faith alone is not enough); *Case v. Murdock*, 488 N.W.2d 885, 891 (S.D. 1992) (actual or presumed malice is required); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (Minn. 1990) (willful, wanton and malicious conduct or willful indifference required); *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 229 (Iowa 1992) (willful, wanton, actual or legal malice is required); *Burnett v. Griffith*, 769 S.W.2d 780, 787-89 (Mo. 1989) (en banc) (outrageous conduct and culpable mental state or evil motive is required).

another day when it can be considered under a properly raised objection.[11]

B. Partial Remand

My further explanation of the reasons for reversing the judgment for punitive damages begins with an examination of our previous decisions. The panel in *Robertson I* could not determine the exact basis for the jury's punitive damages award. *Robertson I*, 871 F.2d at 1377. Since some submitted theories could not support a punitive award, a retrial was ordered. *Id.* That part of the decision was clearly correct. It was incorrect, however, to order a retrial on less than all of the issues. That decision disregarded applicable law and was unfair to Phillips.

In its first appeal, Phillips vigorously argued for a retrial on all issues, relying on our decision in *Dudley v. Dittmer*, 795 F.2d 669 (8th Cir. 1986). Phillips' Brief (*Robertson I*) at 42. *Dittmer* held that "when one of two theories has erroneously been submitted to the jury, a general verdict cannot stand." *Id.* at 673. The *Robertson I* panel correctly concluded that *Dittmer* was applicable to the result of the first Robertson trial. *Robertson I*, 871 F.2d at 1375. The panel also correctly concluded that there was "only one basis for actual damages, the loss of the Spe-Dee Mart account." *Id.* at 1376. It then let the tortious interference with contract verdict stand and allowed the $750,000 compensatory award to escape reconsideration on retrial. *Id.* at 1377.

This may have been a proper result had the nature and amount of compensatory damages not been so inextricably intertwined with both a finding of punitive damages and the proper determination of their amount. Although a federal court sitting in diversity must apply the substantive law of the forum, the Federal Rules of Civil Procedure

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[11] Perhaps the *Viking Insurance* decision has now solved the problem in Arkansas.

govern procedural matters. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The Federal Rules permit partial retrials but only when the issues are distinct and separable. Fed. R. Civ. P. 59(a); *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). In this circuit, the district court must consider the law of the forum state when deciding whether to grant only a partial retrial. *England v. Gulf & Western Mfg. Co.*, 728 F.2d 1026, 1029 (8th Cir. 1984); *see also Sayre v. Musicland Group, Inc.*, 850 F.2d 350, 353 (8th Cir. 1988) ("[r]eference to state law can be helpful"). Under Arkansas law, issues of punitive and compensatory damages are generally so interwoven that an error with respect to one requires a retrial of the whole case. *See Orsini v. Larry Moyer Trucking, Inc.*, 833 S.W.2d 366, 368 (Ark. 1992); *City Nat'l Bank v. Goodwin*, 783 S.W.2d 335, 339 (Ark. 1990); *KARK-TV v. Simon*, 656 S.W.2d 702, 705 (Ark. 1983). The panel in *Robertson I* was rightly "troubled . . . with the interplay between the considerations involved in compensatory and punitive damages." *Robertson I*, 871 F.2d at 1376. This concern was supported by the evidence and was sufficient to require a new trial on both issues.

As noted, since *Robertson I* was decided, the Supreme Court has issued two opinions on punitive damages. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). These cases underscore the *Robertson I* panel's concern. "[I]f punitive damages [are] to be awarded, the jury must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Haslip*, 499 U.S. at 19 (quotation omitted). Post-trial procedures validated by *Haslip* include consideration of the culpability of the defendant's conduct, the impact of the conduct upon the parties, and other factors such as the impact on third parties. *Id.* at 20-21. The Supreme Court also said that a required determination is whether there is a reasonable

relationship between the punitive damages award and the harm likely to result from the defendant's conduct, as well as an evaluation of the harm that actually occurred. *Id.* at 21. The Supreme Court's most recent pronouncement on punitive damages does not negate this proportionality requirement. *TXO,* 113 S. Ct. at 2721. Punitive or "exemplary damages allowed should bear some proportion to the real damage sustained." *Id.* The "[p]unitive damages should bear a reasonable relationship . . . to the harm that actually has occurred." *Id.* This determination of proportionality is necessary for there to be a definite and meaningful constraint on the discretion of the factfinder, in this case, the jury. *See Haslip,* 499 U.S. at 21.

Applying these rules, it is impossible to see how the second *Robertson* jury could have lawfully and fairly considered the issue of punitive damages without considering the nature of the compensatory damages and the evidence on which they were based. For instance, with regard to the punitive award rendered by the second jury for tortious interference with contract, the second jury was told only that an earlier jury had found that Phillips had not acted "in its own fair interest," that Robertson was damaged in the "amount of $750,000 and they [the second jury] should not question these findings." Trial II Transcript, Vol. 3 at 207. This approach was required by our opinion in *Robertson I* and it was error.

Robertson's only evidence of damages at the first trial was its diminished profits from the loss of the Spe-Dee Mart account.[12] At the second trial, absolutely no evidence was adduced on the nature and extent of compensatory

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[12] Bruce Andrews, a certified public accountant from Little Rock, Arkansas, testified as an expert witness on the lost profits purportedly suffered by Robertson. Trial I Transcript, Vol. 2 at 43-91. Phillips responded with testimony from Richard H. Smith, a certified public accountant from Tulsa, Oklahoma, on the same subject. Trial I Transcript, Vol. 3 at 162-249.

damages. Thus, in deliberation, the jury had no information on compensatory matters except an instruction that an earlier jury, who heard several different witnesses on the issues of both liability and damages, had awarded $750,000.

This is not enough under either *Haslip* or Arkansas law. As the panel in *Robertson II* noted,

> "[T]he nature, extent, and enormity of the wrong, the intent of the party committing it, and, generally, all the circumstances attending the particular transaction involved, including any mitigating circumstances which may operate to reduce without wholly defeating such damages, may be taken into consideration, and so, as a rule, may the financial and social condition and standing of the party."

Robertson II, 930 F.2d at 1346 (quoting *Holmes v. Hollingsworth*, 352 S.W.2d 96, 99 (Ark. 1961)).

The second jury had no information on the nature of the lost profits or any of the circumstances attending the particular economic loss calculations. Likewise, Phillips was precluded at the second trial from offering any evidence on mitigation of economic loss. As a result, the punitive damages awards were the product of jury speculation based on an incomplete factual presentation.

C. Lack of Underlying Compensatory Award

The most troublesome aspect of this case is the decision to affirm a $4,000,000 punitive damages award for fraud without an underlying award for compensatory (actual) damages arising from fraudulent conduct.[13] The law of

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[13] An argument has been made that there are somehow mirroring compensatory awards for fraud and tortious interference or, at least, that the fraud award is subsumed within the tortious interference award, and there is, therefore, an underlying compensatory award for each punitive award. One of several weaknesses in this argument is that,

Arkansas is crystal clear: "punitive damages are not recoverable unless compensatory damages not only have been suffered by the plaintiff but also have been assessed by the jury." *Lake v. Lake,* 562 S.W.2d 68, 69 (Ark. 1978). There has been no valid determination by either the first or second jury that Robertson suffered compensable damages resulting from fraud. Thus, at least, the punitive award based upon fraud should be set aside.

On retrial after *Robertson I,* the plaintiff chose to proceed on only one theory of recovery, fraud.[14] Of course, under our panel decision in *Robertson I,* plaintiff had already prevailed on the tortious interference theory and had obtained an award of compensatory damages. Thus, according to *Robertson I,* the only issue with regard to the tortious interference theory, as earlier discussed, was punitive damages.[15] Because we said in *Robertson I* that "[e]ach of these theories ... would support a different amount of punitive damages, depending upon the conduct involved," *Robertson I,* 871 F.2d at 1376, the district court submitted the case to the jury on three separate interrogatories, one dealing with liability for fraud and two dealing with punitive damages, one for each liability theory. As also noted, no inquiry was made at the second trial with regard to compensatory damages for either theory. If all roads do not now lead to Rome for punitive damages purposes, and we are really dealing with two discrete intentional torts, each separate punitive award

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even if there were evidence of damage caused by the fraud, it is impossible for a reviewing court to ascertain what portion of the damages to attribute to the fraud for purposes of a proportionality review as mandated by both *Haslip* and *TXO. See* discussion, *supra,* at 40-42 [40a-43a].

[14] Robertson abandoned its claim for negligence at the beginning of the trial. Trial II Transcript, Vol. 1 at 5.

[15] A proper analysis of the facts shows that we were wrong in *Robertson I* and we directed the district court toward a faulty approach in the second trial.

must also be supported by a separate compensatory award.[16]

Robertson contends that two different fact patterns support the jury's distinct findings of tortious interference with contract and fraud.[17] Robertson's fraud claim was

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[16] In its now-vacated opinion, the panel stated that Phillips "got what it asked for" in the retrial, since it had requested separate damage instructions in the first trial. *Robertson III*, 1992 U.S. App. LEXIS 30,167 at **33. Such is not the case. Phillips initially asked for separate damage interrogatories on the compensatory damage claims, not the punitive claim. Trial I Transcript, Vol. 5 at 44. The approach was rejected by the district court. *Id.* After the liability determination were made, Robertson asked for and received a jury instruction requiring *one* compensatory award. *Id.* at 147. Robertson's adoption of the bifurcation of damage awards approach comes on the scene, apparently, as a result of our statement in *Robertson I* that "all intentional torts which support[ed] the punitive damage award [of $5,000,000], each involve[d] different conduct." *Robertson I*, 871 F.2d at 1376. Thus, with respect, it is Robertson, not Phillips, that has changed position as the litigation has progressed on the proper approach to awarding damages.

Also, in its present opinion, the court states, "Phillips, however, never argued that there was not an award of compensatory damages underlying the award of punitive damages for fraud" after its second or third appeal to this court. *Supra* at 17 [17a-18a]. Again, with respect, this is incorrect. In its opening brief in the third appeal (leading to the panel opinion designated *Robertson III*), Phillips argued extensively and accurately that the two separate $4,000,000 awards imposed "duplicate punishments for the same injury." Phillips' Brief (*Robertson III*) at 35-37. Additionally, the first question raised in Phillips' suggestions for this en banc review encompasses this issue. Thus, the court has had ample notice of this obvious problem of duplication of damages.

[17] I note that the court's opinion, *supra* at 20 [21a], states that "Phillips argued against the single punitive damage award returned in the first trial." The opinion then contends that "[i]n a sense . . . Phillips got what it asked for [duplicative punitive awards] in the second trial." *Supra* at 22 [22a-23a]. This statement requires, in my view, a substantial misinterpretation of Phillips' reply brief in *Robertson I*. Phillips argued, correctly, that the district court separately submitted several theories of liability (conduct proving some theories would support punitive damages and conduct proving other theories would not), but

premised on misrepresentations or assurances made by Phillips during the spring and summer of 1984 that Phillips would "brand" all retail outlets of Robertson's client, Spe-Dee Mart, with the "Phillips 66" logo. Any alleged acts that factually support this claim ended, by Robertson's own account, when he was informed, on the night before the October 24, 1984, meeting, that Phillips would not brand all the Spe-Dee Mart stores.[18] The essence of the tortious interference claim was that Phillips said or implied nasty

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submitted only a "general or global" inquiry on punitive damages without in any way limiting the jury's use of all the evidence. Phillips' Reply Brief (*Robertson I*) at 3. Indeed, Phillips accurately pointed out that the jury was permitted to assess punitive damages on every action from May through October for conduct supporting all causes of action (including some that do not support punitive damages) and was permitted to consider proof of a theory based upon a duty of good faith and fair dealing which was set aside by the district court after trial. *Id.* at 4. The jury instruction on this improper theory, according to Phillips' brief, required findings involving standards of decency, fairness, reasonableness, good faith and honesty. Thus, as noted by Phillips' brief, "the jury was permitted to consider breaches of duty defined in the strongest terms (decency, honesty, fairness, and good faith) in arriving at the punitive damages award, when those breaches of duty did not exist as a matter of law." This was the context in which the argument in the reply brief now cited by the court's opinion was made. And, Phillips was correct, some of the conduct may have been proper to consider for punitive damages purposes and some was clearly not. Transformation of this argument into a request by Phillips for consideration of duplicative punitive awards by the jury, is, in my view, a clearly incorrect reading of the Phillips' brief.

[18] Robertson testified that Phillips had promised in April or May of 1984 that it would brand all the Spe-Dee Mart stores. Trial II Transcript, Vol. 1 at 267-270. He further stated that the promise was renewed at various times later in the summer prior to the October meeting. He was told the night before the meeting that the branding was not going to happen. There was evidence that Spe-Dee Mart was cleaning up its stores during the fall of 1984 in preparation for an "inspection," which could indicate that Robertson conveyed some message to Spe-Dee Mart about branding. Trial II Transcript, Vol. 2 at 174. There was no evidence that Spe-Dee Mart was told by either Robertson or Phillips that Phillips had promised to brand all outlets.

things abut Butch Robertson to the owners of Spe-Dee Mart at that meeting and, as a result, Spe-Dee Mart severed its connections with Robertson. No one challenges the assumption that the only compensable damage in the case arises from Robertson's loss of the Spe-Dee Mart account. Indeed, evidence as to the value of lost profits because of Robertson's loss of the Spe-Dee Mart account was the only actual damage evidence ever submitted by Robertson.

Under Arkansas law, the elements of a fraud claim are 1) a false representation of a material fact; 2) knowledge or belief on the part of the person making the representation that the representation is false; 3) an intent to induce the other party to act or refrain from acting in reliance on the misrepresentation; 4) a justifiable reliance by the other party; and 5) resulting damages. *Interstate Freeway Serv., Inc. v. Houser*, 835 S.W.2d 872, 873-74 (Ark. 1992). An essential element of a fraud claim is proof of damages proximately caused by the misrepresentation. *Ozark Kenworth, Inc. v. Neidecker*, 672 S.W.2d 899, 904-05 (Ark. 1984). With no proof of causal connection between the misrepresentation and the injury, a claim must fall. *Id.*

There is no proof of causal connection between the misrepresentation and the injury in this case.[19] The fraud did not cause the loss of the Spe-Dee Mart account—the nasty things said or implied about Butch Robertson at the Oc-

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[19] This is not to say that Phillips' decision not to brand Spe-Dee Mart played no part in Spe-Dee Mart's termination of its relationship with Robertson. The decision not to brand was the subject of a separate cause of action for breach of contract on which the jury could not reach a verdict. Trial I Transcript, Vol. 5 at 74-75. The district court declared a mistrial on that claim. *Id.* at 165. The fact that Phillips, for five months, misrepresented its position on the decision not to brand did not cause the Greenwoods to sever their business relationship with Robertson.

tober meeting caused, according to Robertson, the loss of the account.

The evidence is absolutely clear that Robertson connected the loss of the Spe-Dee Mart account to the October meeting. He testified that the "deal that we had [to brand Spe-Dee Mart] was . . . blown by the comments that were made at the [October] meeting with the Greenwoods that morning in their office." Trial II Transcript, Vol. 2 at 113. Stanley Greenwood stated that as a result of the meeting "I told my father we had a problem, that I perceived that Butch was history with Phillips." *Id.* at 182. Greenwood also stated that he perceived some problem with Robertson's finances before the October meeting. *Id.* at 197-98. This perception and the discussions at the October meeting, according to Greenwood, caused him to speed up his search for a jobbership. *Id.* at 211. The Spe-Dee account was lost as a result of Greenwood's perception, developed prior to the October meeting, that Robertson had financial problems, coupled with the further perception gained at the October meeting that Robertson "was history" with Phillips. Phillips' purported promises to Robertson that it would brand all Spe-Dee Mart stores could not, by themselves, be the legal cause of the loss.[20]

The proper measure of damages on the fraud claim, under Arkansas law, is Robertson's out of pocket loss.[21]

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[20] Phillips had no duty to brand Spe-Dee Mart or any other entity. I concede, however, that if Spe-Dee Mart knew of the promises made to Robertson at the time of the October meeting, this could have been a factor in the formation of its conclusion that Robertson "was history" with Phillips. But this was part and parcel of the tortious interference, not evidence of damages flowing proximately from the fraud.

[21] Two measures of damages are generally applied in Arkansas actions for fraud. *Interstate Freeway*, 835 S.W.2d at 875. The first measure is the benefit of the bargain measure, in which the injured party is entitled to the difference between the value of the property, business, or chattel as represented and its actual value at the time of purchase.

See, e.g., Interstate Freeway, 835 S.W.2d at 875. Evidence which might have supported Robertson's damages for fraud could have included a showing that he expended sums in anticipation of the eventual branding or that the value of some service or asset promised by Phillips was less than represented by Phillips. There is no such evidence.

Robertson did testify that because of the false representations by Phillips, he did not seek an alternative supplier who would be willing to brand Spe-Dee Mart. Trial II Transcript, Vol. 1 at 279. There was, however, no further evidence that Spe-Dee Mart, in such event, would have been willing to accept a substitute for Phillips or that Robertson could have found another satisfactory supplier. To the contrary, the evidence was that Spe-Dee Mart had been looking for its own jobbership and that it otherwise desired branding only with Phillips because of credit card volume at one Phillips outlet that Spe-Dee Mart had purchased. Trial II Transcript, Vol. 2 at 174-75. Neither was there evidence that this reliance scenario proximately caused any of Robertson's damages. There was no evidence that Robertson would have conducted himself any differently toward Spe-Dee Mart had the alleged misrepresentations made by Phillips in the spring or summer of 1984 not been made. In short, proof of causation connecting the purported misrepresentations and the lost profits from the Spe-Dee Mart account is absent.

Id. In essence, the injured party would receive his expectation. *Id.* The second measure is the out-of pocket measure, in which the injured party is to be made whole by being restored to the position he was in prior to the injury. *Id.* The first has no application to the circumstances of this case. *Cf. Central Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1220-21 (8th Cir. 1982) (benefit of bargain measure makes no sense in a case not involving representations as to specific values), *cert. denied*, 459 U.S. 1204 (1983); *Kerr v. First Commodity Corp.*, 735 F.2d 281, 285 (8th Cir. 1984) (benefit of bargain rule is inadequate in some circumstances including when nothing of value is received in the transaction).

Further, the jury in this case was not given any instruction on the measure of damages for fraud, which is different than the measure of damages arising from tortious interference.[22] Jurors were told only the elements of fraud and the definition of proximate cause. A special interrogatory asked whether the actions of Phillips were the proximate cause of damage to Robertson, but the jury was never told how to measure such damages. The district court instructed the jury that Robertson had been damaged in the amount of $750,000 and that:

> [t]his amount, this $750,000, has already been awarded to Robertson Oil Company for its compensatory damages. You should not, therefore, make any award to compensate Robertson Oil Company *for its loss of the Spe-Dee Mart account* on either the allegation of fraud or the allegation of intentional interference with contract.

Trial II Transcript, Vol. 3 at 207-08 (Emphasis added). This instruction effectively directed a verdict on the issue of causation and the measure of damages for fraud. This was error. The law and the evidence do not support such an instruction or such a finding. The acts of fraud should properly have been viewed as nonactionable "bad acts;" as evidence which is, of course, relevant to the issue of the motive or intent or state of mind of Phillips on the tortious interference claim, but which cannot and did not stand alone as a separate cause of action for fraud.

The problems in this case are illustrated by comparison to another Eighth Circuit case that correctly approved a dual award of punitive damages. In *Glass Design Imports,*

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[22] The proper measure of damages for tortious interference is the present value of profits lost as a result of the improper actions. Restatement (Second) of Torts, § 774A(1)(a) and (b) (1979). *See, e.g., H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1549 (8th Cir. 1989) (applying Minnesota law). The measure of damages for fraud is either "out-of-pocket" or "benefit of the bargain." *See supra* n.21.

Inc. v. Import Specialties, 867 F.2d 1139 (8th Cir. 1989), we approved separate punitive awards for tortious interference and fraud. Examination of that case shows that each award was supported by a distinct and separable compensatory award and by distinct and separable culpable conduct by the defendant which caused palpable injury to plaintiff.

In that case, Glass Design, an importer, asserted claims of fraud and tortious interference with a business relationship against, among others, Rastal GmbH & Co. KG, a German corporation that manufactured specialty glass and Gene Lepere, Rastal's American agent. The parties agreed that Glass Design would be Rastal's sole American importer and retailer except for some preexisting customers serviced by Lepere. Further, Rastal and Lepere represented that Rastal's products were made in West Germany by Rastal. Glass Design soon became aware that it was not the sole Rastal distributor in the United States and that much of the glass was not made by Rastal or anyone else in West Germany.

In a separate incident, a customer (Cribbins) sought to purchase 200 beer steins which Glass Design did not have in stock. This prompted Glass Design to contact Lepere who informed Glass Design that he also had none. Later, Lepere himself sold the steins to the customer without paying a commission to Glass Design who had arranged the sale.

The district court entered judgments for Glass Design. We affirmed both punitive awards because Lepere's actions in the Cribbins deal constituted conduct "separate and apart from the fraudulent misrepresentations made to the principals of Glass Design," and because both compensatory awards could independently support punitive damages.[23] *Id.* at 1144-45.

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[23] In contrast to the present case, the compensatory award for fraud

Obviously, the interference with the Cribbins' expectancy, which occurred months after the date of the fraudulent misrepresentations on exclusivity and origin, was a separate act that gave rise to both separate compensatory damages and a separate punitive award. In contrast, in this case, the acts of fraud gave rise to no separate damages and thus can only be viewed as part of a continuing pattern of conduct leading to the eventual tortious interference and not as a separate actionable tort. Thus, at best for Robertson, *Glass Design* could only support the $4,000,000 punitive fraud award if the underlying facts had represented a separate, discrete event leading to separate, calculable compensatory damages. Such is not the case here. The punishment, if any were proper, should have been meted out for the conduct leading to the single compensatory award.[24]

D. Duplicative Awards

Even if the dual punitive awards had been supported by valid compensatory awards, the punitive awards are nevertheless duplicative. In *Holmberg v. Morrisette,* we stated that "[f]raud and conversion are separate legal theories of liability, but in reality defendants have injured Holmberg only once. Accordingly, *they are to be punished only once, not as many times as there are separate legal*

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in *Glass Design* was supported by concrete evidence of losses incurred in reliance on the misrepresentations (including lost profits on direct sales, loan losses, initial capital investment and legal and professional fees). *Glass Design,* 867 F.2d at 1141.

[24] Again, as noted *supra* at 40-42 [40a-44a] and 43 n.13 [43a n.13], even if some portion of the $750,000 compensatory award could be attributed to the fraud claim, the jury could not have considered the nature, character and amount of the compensatory award in the second trial as required by both *Haslip* and Arkansas law for the award of punitive damages. How did the district court, in its *Haslip* review of punitive damages ordered by this court, determine what part of the $750,000 to apportion to the tortious interference theory and which part was awarded for fraud? Of course there is no way for this to have been done fairly. It should not have been done this way at all.

theories that have been found to fit the case." Holmberg v. Morrisette, 800 F.2d 205, 212 (8th Cir. 1986) (emphasis added).[25]

Strangely, in this case we have two separate juries deciding liability issues, one jury hearing the evidence on and deciding the amount of compensatory damages and the other jury deciding punitive damages. The district court was correct at the first trial to submit the case, if it was submissible at all, for one determination of punitive damages arising from the entire core of facts leading to the single compensatory award. As noted in *Holmberg,* the number of legal theories of liability arising from one core of facts does not change the legal analysis on punitive damages.

Recognizing that this court en banc is entitled to overrule *Holmberg,* I have searched the reporters for cases affirming dual awards of punitive damages arising out of one core of facts, even one as wide ranging and repetitious as n *Holmberg.*[26] I found none.[27] On the other hand, there

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[25] Much has been said recently in this circuit about the "law of the case" doctrine. In this regard, it should be noted that the panel opinion in *Robertson III* is clearly contrary to the ruling in *Holmberg.*

[26] *Holmberg* involved a series of business transactions involving Mintex, a Minnesota corporation; Morrisette, a shareholder of Mintex; RJC Enterprises, a business partly owned by Morrisette; Trans World Services, Inc., a Minnesota corporation; Holmberg, an individual supplying a letter of credit; and G.N.A. Hamzer & Co., a Nigerian importer. The business activity at issue extended over a period exceeding one year. The pleadings alleged two counts of fraud and conversion based upon multiple acts of submitting and supporting false documents in an effort to draw down a letter of credit.

[27] There is a Florida case in which a dual award was affirmed, *See Palm Beach Atlantic College, Inc. v. First United Fund, Ltd.,* 928 F.2d 1538, 1546 (11th Cir. 1991). However that case is inapposite for the reason that Florida law does not require an underlying award of compensatory damages for imposition of punitive damages. I believe that *Haslip* now places this proposition of law in doubt.

are numerous cases both in and out of this circuit which require a nonduplicative result when exemplary and punitive damages are found under a single core of facts giving rise to compensatory damages. *See, e.g., Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 218 (3d Cir. 1992) (requiring election of either statutory treble damages for antitrust violations or common law punitive damages for tort claims), *cert. denied*, 113 S. Ct. 1285 (1993); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1284 (8th Cir. 1981) (treble damages for antitrust count and punitive damages for state law count would be duplicative); *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819, 822 (Colo. 1992) (treble damages and punitive damages awarded under misappropriation claim and deceptive trade practices claim were duplicative and both were not recoverable); *Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987) (awards of treble damages for deceptive trade practices and punitive damages under common law claim amount to prohibited double recovery); *Stoner v. Houston*, 582 S.W.2d 28, 31 (Ark. 1979) (treble damages allowed under statute for damage to timber were punitive and prohibited as duplicative of punitive damages awarded for trespass).

Finally, to summarize Parts C and D, because they are somewhat interwoven, I note that if the acts supporting the fraud claim and the tortious interference claim necessarily intertwine and overlap in order to establish elements of a claim represented by Robertson's lost profits, *Holmberg* and every other case I have found dictate a single punitive award. If, on the other hand, the acts underlying each tort, separately support the elements of a claim flowing from each separate tort, then Arkansas law and the law of every other jurisdiction except, perhaps, Florida, preclude a punitive award for the fraud claim without a separate and distinct compensatory award based on fraud.

This represents the rule of law in effect in virtually every jurisdiction. It is also the only fair approach to the issue. Accordingly, the $4,000,000 punitive damages award for fraud returned by the second jury was error and should be set aside.

III. CONCLUSION

As noted earlier, at the end of Robertson's case in the first trial, Phillips made a motion for a directed verdict on Robertson's claim for punitive damages. The district court stated, in response, "I'm not inclined to think that there's been much of a case been made out for punitive damages, but I want to think about it some more." Trial I Transcript, Vol. 2 at 210. The court was correct. The record does not disclose much of a case for punitive damages.

At the end of Robertson's case in the second trial, Phillips made a motion to dismiss Robertson's fraud claim. The district court stated, "Well, I'm going to deny the motion, but it is a thinner case than the last one." Trial II Transcript, Vol. 2 at 231. This statement at the second trial must be considered in light of the fact that the first jury could not reach a verdict on whether Phillips promised Robertson that it would "brand all the Spe-Dee Mart Stores." Jury Instruction Interrogatory No. 1, Trial I Transcript, Vol. 5 at 75; Return of Verdict, *Id.* at 142. This was the purported promise, vigorously denied by Phillips, that Robertson claimed Phillips did not intend to keep when made in May of 1984 and at various other times during that summer. Thus, if the second trial evidence on fraud was thinner than the evidence at the first trial, the Robertson fraud theory must represent one of the thinnest fraud cases in the history of Arkansas law ever to support a substantial award of punitive damages.

Accordingly, I would reverse and remand for a new trial, or, in the alternative, reverse and dismiss the

$4,000,000 punitive award based upon the intentional tort of fraud.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 91-3717WAFS

Robertson Oil Company, Inc.,

Appellee,

vs.

Phillips Petroleum Company,

Appellant.

Appeal from the United States District Court for the Western District of Arkansas

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The suggestion for rehearing en banc is granted. The judgment and opinion filed by the panel are vacated.

This case will be set for argument before the court en banc at a later date.

Chief Judge Arnold and Judge Morris S. Arnold took no part in the consideration or decision of this case.

January 27, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

No. 91-3717

Robertson Oil Company, Inc.,

Appellee,

v.

Phillips Petroleum Company,

Appellant.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: June 8, 1992

Filed: November 18, 1992

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Phillips Petroleum Company appeals from a district court[1] order refusing to vacate two punitive damage awards—$4,000,000 for tortious interference with a business relationship and $4,000,000 for fraud—after the re-

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[1] THE HONORABLE MORRIS SHEPPARD ARNOLD was United States District Judge for the Western District of Arkansas at the time this case was submitted and was appointed Circuit Judge of the United States Court of Appeals for the Eighth Circuit on June 1, 1992.

mand we ordered in *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991). Phillips now argues that the district court erred in reviewing the punitive damage awards by applying the Arkansas "shock the conscience" standard because that standard does not constrain the jury's discretion when awarding punitive damages so as to satisfy due process considerations. Phillips also argues that the two $4,000,000 awards are grossly disproportionate, arbitrary, capricious, and fundamentally unfair in violation of due process, duplicative, and an abuse of discretion, and that the jury's deliberations were impermissibly influenced by inflammatory evidence of Phillips' wealth. We affirm the punitive damage awards.

The case is now before us for the third time, and we need not repeat the underlying substantive facts, which are set out in our two earlier decisions: *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368, 1369 (8th Cir. 1989); and *Robertson II*, 930 F.2d at 1342.

The first trial in the case resulted in verdicts against Phillips for fraud, negligence, and tortious interference with a business relationship;[2] an actual damage award of $750,000; and a punitive damage award of $5,000,000. *Robertson I*, 871 F.2d at 1369. We affirmed the tortious interference verdict, but reversed the negligence and fraud verdicts as inconsistent. *Id.* We upheld the actual damage award because it was based on only one injury, the loss of the Spe-Dee Mart account, and the tortious interference verdict established Phillips' liability for that injury. *Id.* at 1376. We struck the punitive damage award, however, because a jury must consider the defendant's conduct when it determines the amount to award, and the general verdict form in this case made it impossible for us to determine how much of the punitive damage award was based on the conduct the jury associated with each of its findings

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[2] The jury also found Phillips liable for breaching the duty of good faith and fair dealing, but the district court overturned this finding.

of liability. *Id.* We said that "[e]ach of these theories . . . would support a different amount of punitive damages depending upon the conduct involved." *Id.* Some of the punitive damage award may have been based on the conduct underlying the negligence and fraud theories that were reversed. *Id.* Therefore, the case was remanded for retrial of the negligence and fraud claims and the punitive damage award. *Id.* at 1377.

The second trial resulted in a verdict against Phillips on the fraud claim,[3] and punitive damage awards of $4,000,000 for fraud and $4,000,000 for tortious interference. *Robertson II*, 930 F.2d at 1343. Phillips appealed again. *Id.* We rejected various claims of error, but because of the intervening United States Supreme Court decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), we remanded with instructions for the district court to consider the propriety of the punitive damage awards under the principles of *Haslip* and Arkansas law. *Robertson II*, 930 F.2d at 1347.

On remand, the district court first analyzed the punitive damage awards under the Arkansas court's "shock the conscience" standard. This standard allows punitive damage awards to stand unless the amount shocks the conscience of the court or demonstrates that jurors were motivated by passion or prejudice. *O'Neal Ford, Inc. v. Davie*, 770 S.W.2d 656, 659 (Ark. 1989). The district court studied the historical development of the "shock the conscience" standard and determined that the standard's "long and distinguished history . . . bears testimony to its utility and constitutionality." *Robertson Oil Co. v. Phillips Petroleum Co.*, 779 F. Supp. 994, 996 (1991). The court then examined Arkansas cases applying the standard and concluded that the Arkansas Supreme Court had enumerated a number of specific inquires which gave the standard a

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[3] Robertson retried both the fraud and negligence issues, but elected to submit only the fraud theory to the jury.

definite "shape and texture." *Id.* The district court concluded that the standard was not too subjective and that the review criteria and procedures ensured a "meaningful and adequate review by the trial court" as required by *Haslip*, 111 S. Ct. at 1044, and therefore, satisfied due process. 779 F. Supp. at 997. The district court then applied the Arkansas review criteria and allowed the awards to stand. *Id.* at 997-98.

I.

Phillips advances a multi-faceted argument that the Arkansas "shock the conscience" standard of review does not adequately constrain the discretion of juries to impose punitive damages so as to satisfy due process. Expanding this general argument, Phillips asserts that "standardless" and virtually unlimited jury discretion to punish and highly deferential judicial review of punitive damage verdicts render the Arkansas system constitutionally defective under *Haslip*. Phillips argues that application of the Arkansas standard of malice has been inconsistent and unpredictable, and that there is no fixed standard for the measurement of punitive damages or legislatively defined range. Phillips further argues that there is no reasonable relationship between the compensatory and punitive damage awards. Phillips then launches into a more specific attack on the "shock the conscience" standard, and asserts that federal courts applying Arkansas law have taken a broad brush approach to this standard. Phillips also argues that the Supreme Court approved the punitive damage system in *Haslip* because Alabama limited jury discretion and had a two layered post-verdict review procedure for evaluating the propriety of punitive damages. Finally, Phillips argues that the district court's application of the Arkansas "shock the conscience" standard was constitutionally flawed.

Phillips' broad based arguments fail to recognize the scope and nature of the district court's review of the punitive damage awards, and in truth, fail to recognize the

review that Arkansas courts have made of punitive damage awards.

When the district court analyzed the punitive damage awards, it first considered the Arkansas "shock the conscience" standard and the question of whether jurors were motivated by passion and prejudice. 779 F. Supp. at 995-96. The court engaged in an historical analysis of the "shock the conscience" standard in Arkansas cases, as well as earlier English cases, and then examined the awards under the standard in *Haslip*. *Id.* at 996-98. The district court observed that the Arkansas Supreme Court has given the "shock the conscience" standard a "definite shape and texture" by engaging in a number of specific inquiries. *Id.* at 996. The district court stated:

> For example, the [Arkansas Supreme C]ourt has examined the relationship between the relevant parties, the ratio of the punitive award to the compensatory award, the extent and duration of a defendant's acts, the deliberateness of the defendant's acts in the face of no justification for them, the defendant's motives, the defendant's remorse, if any, the defendant's net worth, and other matters, in order to judge the propriety of a punitive award.[4]

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[4] The district court cited these Arkansas Supreme Court decisions in support of this enumeration: *Walt Bennett Ford, Inc. v. Keck*, 768 S.W.2d 28 (Ark. 1989); *First Commercial Bank v. Kremer*, 728 S.W.2d 172 (Ark. 1987); *Twin City Bank v. Isaacs*, 672 S.W.2d 651 (Ark. 1984); *Pursley v. Price*, 670 S.W.2d 448 (Ark. 1984); *Matthews v. Rodgers*, 651 S.W.2d 453 (Ark. 1983); *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518 (Ark. 1972); *Holmes v. Hollingsworth*, 352 S.W.2d 96 (Ark. 1961); *Vogler v. O'Neal*, 295 S.W.2d 629 (Ark. 1956); *McGlone v. Stokes*, 104 S.W.2d 191 (Ark. 1937); *St. Louis Southwestern Ry. Co. v. Hagler*, 254 S.W. 1071 (Ark. 1923); *Gordon v. McLearn*, 185 S.W. 803 (Ark. 1916); and *Pine Bluff & Arkansas River Ry. Co. v. Washington*, 172 S.W. 872 (Ark. 1915).

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Id. at 996-97. Applying these criteria, the district court observed that not one, but two juries had unanimously awarded punitive damages on findings that Phillips had committed two intentional torts, and that the ten-to-one ratio of punitive damages to actual damages did not suggest excessiveness in light of Phillips' net worth. *Id.* at 997. The district court rejected Phillips' assertion that Phillips' net worth triggered passion and prejudice on the part of the jurors, because evidence of net worth had not been allowed until the jury made a finding of liability and fixed the compensatory amount. *Id.* at 998. Finally, the court stated that the nervous and uncertain behavior of Phillips' witnesses could have caused a reasonable fact finder to believe that they were deliberately evasive and had guilty minds. *Id.*

It is evident that the district court considered not only whether the awards shocked the conscience or resulted from passion and prejudice, but also specifically recognized and discussed other factors that numerous Arkansas courts have considered in reviewing punitive damage awards. *Id.* at 996-97. The district court's failure to discuss all the enumerated considerations does not mean that the other factors were not considered. We are satisfied that the district court's analysis properly recognized that although the Arkansas court's "shock the conscience" and passion and prejudice inquiries are broad, the Arkansas cases recognize far more specific issues in their analyses. The district court dealt with a number of the more specific issues, and properly reviewed the issue of punitive damages in light of the Arkansas standards.

Thus, because the district court engaged in a detailed analysis, Phillips' argument that the "shock the conscience" standard does not satisfy due process considerations simply misses the mark. The district court's inquiry was far more specific than this, as is the standard enunciated and the review conducted by Arkansas courts. In our earlier opinions, *Robertson I*, 871 F.2d at 1375-76, and *Rob-*

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ertson II, 930 F.2d at 1346-47, we discussed the elements underlying punitive damage awards and referred to *Holmes v. Hollingsworth*, 352 S.W.2d 96 (Ark. 1961), and *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518 (Ark. 1972). *Ray Dodge* is particularly instructive.

In *Ray Dodge*, the Arkansas Supreme Court concluded that a punitive damage award was based on a finding of legal malice and was not so great as to "shock the conscience" of the court or to indicate passion or prejudice on the part of the jury. 479 S.W.2d at 523. The Arkansas court stated that punitive damages are "the penalty the law fixes for conduct which is malicious, wanton, in violation of a relationship of trust or confidence, or which is done with a deliberate intent to injure another." *Id.* The court emphasized that the punitive damage award must not only "deter similar conduct on the part of the particular tortfeasor," but "must also be sufficient to deter others who might be inclined to engage in such conduct." *Id.* The court observed that although the jury had discretion in fixing the amount of punitive damages, the circumstances in *Ray Dodge* showed the jury had exercised its discretion soundly. The *Ray Dodge* facts indicated that the defendant had committed a deliberate wrong, which, if unpunished, might lead to widespread commercial fraud. *Id.* at 524. The court believed the jury's award was not based on passion and prejudice, but rather evidenced "a legitimate concern for the possible consequences of such a practice" to the general public. *Id.*

The court in *Ray Dodge* then considered particular factors governing the proper amount of punitive damages, including the proportion of punitive to actual damages, the defendant's culpability as shown by the actual damages awarded, the defendant's motives, the degree of calculation involved, and the extent of the defendant's disregard of the rights of others. *Id. Ray Dodge* fleshes out the "shock the conscience" standard with considerable detail.

The district court's analysis in this case covered the same ground as *Ray Dodge* and *Holmes*. In light of the district court's detailed analysis, Phillips' arguments against the "shock the consequence" standard have no merit.

Like Phillips, we recognize that in *Haslip* the United States Supreme Court considered the Alabama procedures as laid down in recent Alabama Supreme Court decisions, and determined that the procedures for reviewing punitive damage awards met constitutional standards. 111 S. Ct. at 1045. The Alabama court's procedures included requiring the trial court to review the award by considering the culpability of defendant's conduct, the desirability of discouraging others from similar conduct, the impact on the parties involved, and the impact on innocent third parties. *Id.* at 1044. The Alabama court had provided additional checks, first, by engaging in a comparative analysis, and then, by applying substantive standards—considering whether the award exceeded the reasonable amount that would accomplish society's goals of punishment and deterrence. *Id.* at 1045. The Alabama court had indicated that many factors could be considered in determining whether an award was excessive or inadequate:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant

> for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. The United States Supreme Court concluded that these standards imposed a sufficiently definite and meaningful constraint on the discretion of Alabama juries in awarding punitive damages. *Id.* The Supreme Court concluded:

> The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Id.

Although the items the district court considered in this case do not match the *Haslip* factors identically, they coincide for the most part, and insofar as the district court did not consider some of the *Haslip* factors, the record reveals that they were inapplicable. We are satisfied that the district court's review complies with the principles laid down in *Haslip*.[5]

Phillips argues that a number of post-*Haslip* decisions in other circuits require reversal of the punitive damage

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[5] One possible exception, however, may exist regarding the overlap Phillips claims exists between the punitive damage award for fraud and the punitive damage award for intentional interference with a business relationship. We will discuss this issue in Part II.

awards in this case. The Fourth Circuit in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), reversed a punitive damage award because South Carolina procedures did not provide for adequate jury instructions or criteria by which a court could measure excessiveness. As discussed above, the Arkansas Supreme Court has established criteria for measuring excessiveness, those criteria were applied, and the district court concluded that the awards were not excessive. Although the *Mattison* court engaged in an interesting discussion about the interplay between South Carolina law and federal law, the district court in this case stated that its review and conclusion would be the same under either federal or state law.[6] Thus, the result in *Mattison* arises from a different legal context, and insofar as *Mattison* is not distinguishable on its facts from this case, we find it unpersuasive. Likewise, the decision of the Tenth Circuit in *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992), applying a "shock the conscience" standard to reduce a $25,000,000 verdict to $12,500,000, is simply distinguishable on its facts.

On the other hand, we are impressed with the Fifth Circuit's analysis in *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377 (5th Cir. 1991). Even though the Mississippi procedural protections were less specific than the Arkansas procedures we discussed above, the court affirmed a punitive damage award. *Id.* at 1385-86. We recognize that *Eichenseer* was a court-tried case, but its analysis is close to the analysis in this case, it considers many of the same factors, and it supports our decision that the district court's conclusion be affirmed. *See also Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (affirming a $6,100,000 punitive damage award based

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[6] For a discussion of the federal standard used to review damage awards, see *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 507-09 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975).

on Texas law considering five factors—fewer than considered in Arkansas), *cert. denied*, 112 S. Ct. 1778 (1992).

Phillips asserts that *Haslip* also dealt with instructions to the jury and asks us to review the instruction given in this case. In *Robertson II*, we held that the instruction given was comparable to that approved in *Haslip*, and that Phillips had waived any defect by failing to offer a more detailed instruction and failing to bring to the court's attention the need for the jury to consider the nature and degree of the wrong—the only *Haslip* factor that was not part of the instruction. *Robertson II*, 930 F.2d at 1347. Phillips invites us to reconsider the issue, particularly in light of this court's later decision in *Union National Bank v. Mosbacher*, 933 F.2d 1440 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 870 (1992).[7] We, however, do not think *Mosbacher*[8] supports a contrary result on the specific instruction and the record before us in this case. We decline the invitation to revisit this issue.

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[7] The dissent disregards the principles of the law of the case by arguing that both *Robertson I* and *Robertson II* were wrongly decided. Four judges of this court and one district court judge, sitting by designation, participated in those decisions, and in both cases this court denied rehearing en banc.

If, contrary to principles of the law of the case, we were to reexamine the propriety of our discussion in *Robertson II* concerning the punitive damage instruction, we note that Phillips failed to offer an instruction that elaborated on the standard for setting the amount of punitive damages. Phillips also offered its own variation of the Arkansas form instruction, which repeated the standard for awarding punitive damages and informed and allowed the jury to consider its financial condition, just like the instruction given. This record prohibits us from reconsidering the constitutional propriety of the instruction as the dissent would do.

[8] The dissent further ignores principles of stare decisis in citing and relying on *Union National Bank v. Mosbacher*, 933 F.2d 1440 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 870 (1992), an opinion authored by the dissenting judge. Although *Mosbacher* was decided thirty-five days after *Robertson II*, it expressed different views on the Arkansas punitive damage instruction.

Phillips also questions whether malice supports an award of punitive damages and was properly submitted in this case. In *Robertson I*, we recognized that the jury had been required to find that Phillips intentionally pursued a course of conduct for the purpose of causing harm in an instruction based on the standard for malice established by the Arkansas Supreme Court. 871 F.2d at 1375. The jury in the first trial made such a finding with respect to the tortious interference claim. *Id.* at 1372-73, 1376; *Robertson II*, 930 F.2d at 1344-45. The jury in the second trial was instructed that this finding had been made by the first jury. 930 F.2d at 1344 n.1, 1345. The second jury was also instructed that under the fraud theory Robertson had the burden of proving that Phillips intentionally pursued a course of conduct for the purpose of causing injury or damage.[9] This forthright submission of the issue of malice is a complete answer to Phillips' argument that malice is a flexible issue under Arkansas law.

Although Phillips articulates other reasons in support of its claim that the punitive damage awards are unconstitutional and legally improper, wheat we have said above adequately disposes of all such claims.

II.

Phillips next argues that the two $4,000,000 punitive damage awards are duplicative and, therefore, constitutionally excessive. The basic assumption of Phillips' argument is that, although Robertson premised its claims on two separate liability theories, it suffered but a single "inseparable" injury—the loss of the Spe-Dee Mart account—giving rise to punitive damages.

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[9] Instruction No. 16 stated: "In order to recover punitive damages from Phillips, Robertson Oil has the burden of proving that Phillips intentionally pursued a course of conduct for the purpose of causing injury or damage."

Robertson responds that the jury returned two punitive damage awards: one based on fraud; the other on tortious interference with contract. Robertson points to this court's opinion in the first appeal to support its argument that there were two theories submitted to the jury, each of which would support a different punitive damage award, depending upon the conduct involved. In *Robertson I*, we stated that "[t]he district court correctly analyzed that all of the liability theories rested upon only one basis for actual damages, the loss of the Spe-Dee Mart account." 871 F.2d at 1376. In discussing punitive damages, we looked to Arkansas Supreme Court decisions discussing punitive damages. These provide that an assessment of punitive damages involves consideration of: the nature, extent, and enormity of the wrong; the intent of the party committing the wrong; and the general circumstances of the particular transaction involved, including any mitigating circumstances, and the financial and social condition and standing of the parties. *Id.* at 1375-76. We recognized that the amount of actual damages is one indication of the "culpability of the defendant." *Id.* at 1376 (quoting *Ray Dodge*, 479 S.W.2d at 524). We concluded:

> The conduct of Phillips relevant to an award of punitive damages necessarily differs according to the various theories of liability on which the jury based its verdict.
>
> . . .
>
> We are troubled, however, with the interplay between the considerations involved in compensatory and punitive damages. As we have explained above, the conduct of a defendant determines the amount of punitive damages. The tortious interference with a business relationship, fraud, and good faith and fair dealing theories, all intentional torts which support the punitive damage award, each involve different conduct.

> Each of these theories therefore would support a different amount of punitive damages, depending upon the conduct involved.

Id. at 1376.

At the second trial, the court instructed that an earlier jury had found tortious interference with a contractual relationship. The court then authorized the jury to award punitive damages on this theory. The court further instructed the jury as to the elements of fraud, and that it could award punitive damages on the fraud theory. The court submitted special interrogatories to the jury, and the jury awarded $4,000,000 as punitive damages on each of the theories.[10]

This court considered an award authorizing a trebling of damages under RICO and an award of punitive damages under common law fraud and conversion in *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987). We affirmed the finding of liability on the fraud and conversion claims, reversed the award on the RICO claim, and remanded for a new trial on the issues of actual and punitive damages. *Id.* at 212. We explained:

> [We] note that a recovery of compensatory damages on both the fraud and conversion claims

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[10] The jury was instructed in the second trial that Robertson was damaged in the amount of $750,000, that Robertson had already been awarded this amount for compensatory damages, and that no award should be made to compensate Robertson for its loss of the Spe-Dee Mart account on either the allegations of fraud or intentional interference with contract. The instructions further stated that in addition to compensatory damages for actual loss, Robertson asked for punitive damages for both intentional interference with contract and fraud, and the jury was instructed to separately consider punitive damages on each of these theories. Contrary to the dissent, it is evident that the single award of compensatory damages was the basis for the punitive awards on both tortious interference and fraud.

> clearly would be duplicative and should not be allowed. Holmberg has suffered only one injury—the wrongful drawing down of his letter of credit—and is entitled to be compensated for that injury only once. Similar reasoning applies to the question of punitive damages on both the fraud and conversion claims. Fraud and conversion are separate legal theories of liability, but in reality defendants have injured Holmberg only once. Accordingly, they are to be punished only once, not as many times as there are separate legal theories that have been found to fit the case.

Id. Similarly, in *Superturf, Inc. v. Monsanto Company*, 660 F.2d 1275 (8th Cir. 1981), we held that a treble damage award under antitrust laws and a punitive damage award for tortious interference with business were duplicative and could not be awarded. *Id.* at 1283 (relying on *Arnott v. American Oil Co.*, 609 F.2d 873, 878 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980)).

The Arkansas Supreme Court faced a somewhat similar question in *Stoner v. Houston*, 582 S.W.2d 28 (Ark. 1979) (en banc). The plaintiff had recovered both an award for treble damages to timber under Ark. Code Ann. § 50-105 and punitive damages for common law trespass. 582 S.W.2d at 30-31. The Supreme Court of Arkansas held that this recovery "amounted to a double punitive recovery for the illegal act." *Id.* at 31. The court reasoned that the elements of damage were the same under both theories and a double recovery was prohibited. *Id.* Justice Fogleman dissented, arguing that the trespass caused by the scraping of a bulldozer blade was separate and distinct from the act of cutting and destroying trees. *Id.* He suggested that these were two separate items of damages, and punitive damages would lie for each injury. *Id.*

The Minnesota Court of Appeals addressed a similar issue in *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d

670 (Minn. App. 1991). In *Bradley*, a former employee sued her employer on a number of claims, including defamation, breach of implied covenant of good faith and fair dealing, and reprisal discrimination. *Id.* at 673. The basis for the employee's suit began when the employee pieced together, from scraps of paper she found near a photocopier, a memo detailing her supervisor's desire to fire her, and outlining her involvement in two employment disputes with other employees. *Id.* After the employee's supervisor learned of the employee's action, he fired the employee, and circulated a memo claiming the employee retrieved the first memo from his wastebasket. *Id.* Managers were told that the employee was fired for "gross misconduct." *Id.* at 674. The jury found the employer liable for defamation and breach of an implied covenant of good faith and fair dealing, and awarded $12,000 in compensatory damages and $500,000 in punitive damages. *Id.* at 673-74. The employee's claims of discrimination were simultaneously tried to the court, which concluded that the employee had been subjected to reprisal discrimination, awarded compensatory and punitive damages, and assessed a civil penalty under the Minnesota Human Rights Act. *Id.* at 674.

On appeal, the Minnesota Court of Appeals considered whether the employee received a double recovery of compensatory and punitive damages. After concluding the compensatory damage awards were based on discrete events and were not duplicative, *id.* at 677, the court considered the punitive damage awards. The court first concluded there was no duplication between the civil penalty and the punitive damage award under the Human Rights Act because the civil penalty was "intended to supplement compensatory and punitive damages." *Id.* at 678. The court concluded, however, that there was duplication between the penalty under the Human Rights Act and the jury punitive damages award on the defamation claim. *Id.* The court reasoned that it "was likely" that the jury based its punitive damage award on the same misconduct for which

the trial court imposed the civil penalty, and that the trial court did not tell the jury of the penalty as part of the reprisal claim. *Id.* at 678. The appellate court also decreased the punitive damage award relying on *Haslip*. *Id.* at 679.

This leaves us with the question of whether the punitive damage awards in this case are duplicative. Considering the awards under principles of Arkansas law, the actual damages are identical under each of the theories submitted to the jury. Similarly, the financial and social condition and the standing of the parties, are identical with respect to both punitive damage awards.

On the other hand, the nature, extent, and enormity of the wrong, the intent of the party committing it, and the general circumstances attending the particular transaction involved, differ with respect to each of the two awards. These differences are evidenced by the specific jury instructions on each claim. The court instructed the jury that an earlier jury had found the several elements which entitled Robertson to recovery for tortious interference with contract. The court instructed the jury that the previous jury had found:

> First, that there was a valid contract between Robertson Oil Company and Spe-Dee Mart; second, that Phillips Petroleum knew of that contract; third, that Phillips intentionally interfered with that contract by inducing or causing its termination; fourth, that with respect to intentional interference with contract, Phillips was not acting in its own fair interest based upon reasonable economic and business considerations, but with an intent to cause injury or damage to Robertson Oil Company.

The court then instructed the jury on the elements of fraud, stating that the jury should find for Robertson on its fraud claim if it found:

> First, that Phillips made false statements of material fact to Robertson Oil; second, that Phillips knew or believed that the statements were false or lacked a sufficient basis of information to make the statement; third, that Phillips intended to induce Robertson Oil to act or to refrain from acting in reliance on the statements; fourth, that Robertson Oil justifiably relied on the statements in acting or refraining from acting; and fifth, that the actions of Phillips were a proximate cause of damages to Robertson Oil.

With respect to Robertson's claims for punitive damages, the court instructed the jury that it must find that Phillips "intentionally pursued a course of conduct for the purpose of causing injury or damage." The court also instructed that the purpose of punitive damages was "to punish a wrongdoer and to deter others from similar conduct." These aspects of the punitive damage instruction relate directly to the nature, extent, and enormity of the wrong and the intent of the party committing the wrong. It is evident that the jury's deliberations were directed to two different torts and two different injuries, each of which supports an award of punitive damages.

There is one further element in the equation. In the first appeal, Phillips argued against the single punitive damage award returned in the first trial, taking the position that there were in fact two separate injuries. Phillips' reply brief in *Robertson I* argues that there are two bases for punitive damages:

> The punitive damages award herein is in the form of a general or "global" verdict. It is impossible to apportion the award among the various theories of liability found by the jury, because none of the liability interrogatories refer to punitive damages, but only to "damages" in gen-

> eral, and neither of the punitive damages interrogatories are tied to specific torts.
>
> Punitive damages are not intended to compensate an injured party, but to punish and deter conduct of the offending party. Therefore, the existence and size of an award of punitive damages depends upon the conduct of the defendant, not upon the loss to the plaintiff. The loss to Robertson Oil reflected in the compensatory damages interrogatory has no bearing on the punitive damages award.

Phillips' argument continues and makes specific the two differing timeframes of the conduct that might support punitive damages:

> Phillips' relevant conduct differs according to the various theories of liability affirmatively answered by the jury. The key conduct on the tortious interference count allegedly occurred during the meeting between the Phillips representatives and Spe-Dee Mart. However, Phillips' relevant conduct on the fraud, negligence and bad faith counts occurred prior to that time, i.e., in the period up to the October, 1984 meeting between Phillips and Robertson Oil. Yet the jury was permitted to assess punitive damages on every action of Phillips from May through October, 1984, i.e., on *all* conduct of Phillips which supported *all* of the elements of *all* of the causes of action represented by interrogatories Nos. 2-5.

To accept Phillips' argument that both punitive damage awards spring from but one injury requires that we reach a conclusion totally at odds with that embraced by Phillips in the first appeal, a conclusion which led to our holding that separate elements are to be considered in awarding punitive damages, depending upon the nature of the tort involved. *Robertson I*, 871 F.2d at 1376. Although we af-

firmed only a single award of actual damages in *Robertson I*, we are convinced that there were two distinct wrongs giving rise to punitive damages, and Phillips is bound by its admission in the first appeal.[11] In a sense, as Robertson argues, Phillips got what it asked for in the second trial, namely, separate consideration of the punitive damage issue and a separate award by the jury. Phillips is bound in this litigation by the position it took in the first appeal, and its answer that there are duplicative punitive damage awards is most effectively answered by the arguments it asserted in the first appeal. Under these circumstances, we do not believe that the common factors in the two punitive damage awards—namely the amount of actual damages for the single injury and Phillips' net worth—are sufficient to justify a different conclusion.

The jury instructions and the juries' answers to the interrogatories show that the jury based its punitive damage awards on two different tort theories. Phillips argues that the key conduct on the tortious interference count occurred during the meeting between Phillips' representatives and Spe-Dee Mart, which we know from *Robertson I*, occurred in October 1984. *See* 871 F.2d at 1370. The relevant conduct with respect to the fraud, however, occurred in the period between May and the time of the

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[11] Judicial estoppel bars a party from taking inconsistent positions in the same litigation. *Morris v. California*, 966 F.2d 448, 452 (9th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3257 (U.S. Oct. 5, 1992). As the Ninth Circuit recently explained, there are two views regarding the applicability of the doctrine. The majority of circuits hold that judicial estoppel does not apply unless the inconsistent statement was actually adopted by the court in the earlier litigation. *Id.* at 452 (citations omitted). The First Circuit, however, holds that the doctrine applies even when the litigant was unsuccessful in asserting the inconsistent position, if by his change of position he is playing "fast and loose" with the court. *Id.* at 453 (citing *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987)). We need not decide in this case whether to adopt the majority or minority view, in either instance, Phillips is estopped from asserting that there was only one wrong.

October 1984 meeting. *Id.* at 1369-70. Phillips has thus divided the conduct subject to punitive damages into two distinct timeframes, the day of the meeting, and the five-month period leading up to that meeting.

It is evident here that the jury found two separate patterns of conduct: the meeting in October 1984 gave rise to the tortious interference punitive damage award, and the conduct during the five-month period leading up to but not including that meeting gave rise to the fraud claim. Thus, the case differs from *Holmberg*, in which this court held that the defendants had injured Holmberg only once and, accordingly, should be punished only once. *See* 800 F.2d at 212. Similarly, the case differs from *Superturf*, in which the duplication was found between a treble damage award under antitrust statutes, and a punitive damage award for tortious interference with business. *See* 660 F.2d at 1283. *Stoner v. Houston* is distinguishable for the same reason. *See* 582 S.W.2d at 30-31. While Minnesota law does not control this case, the decision of the Court of Appeals of Minnesota in *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670, is also factually distinguishable. That court concluded that the jury assessed its punitive damage award on the same misconduct which the trial court punished by assessing a civil penalty. *Id.* at 678. Here, although there was a single compensatory injury, there were two separate wrongs supporting the punitive damage awards, and the awards are not duplicative.

The record is silent as to whether Robertson requested a cautionary or limiting instruction to guard against the jury considering overlapping conduct on each of the two punitive damage claims. It should have been evident that by submitting two specific claims for punitive damages on two different theories the potential existed for this to occur. Further, we do not know whether Robertson raised the question of duplication before the district court. Certainly, it was not discussed in the district court order, and

such an argument was not pressed in the second appeal of this case. *See Robertson II*, 930 F.2d 1342.

We conclude that the punitive damage awards are not duplicative, and we note that each of the jury awards was approximately five and on-third times the actual damage award. The two together are approximately eleven times the actual damage award. On the record before us, we do not believe that such an amount is sufficient to shock the judicial conscience or to demonstrate that the jury was motivated by passion and prejudice. As the district court observed, strong issues of credibility arose in the trial of the case. The district court specifically commented that a reasonable factfinder could have thought Phillips' principal witnesses were deliberately evasive and that they had guilty minds. Under such circumstances, we should not disturb the jury verdict, and we do not believe that *Haslip*, 111 S. Ct. 1032, or due process principles require us to do so.

We affirm the judgment of punitive damages for fraud in the amount of four million dollars, and for intentional interference with contract in the amount of four million dollars.

BEAM, Circuit Judge, dissenting.

I respectfully dissent. Cases like this must have been on the mind of the Supreme Court when, in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), it said "[w]e note once again our concern about punitive damages that 'run wild.' " *Id.* at 1043. My concern comes in three parts and dates back to *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989) (*Robertson I*).

I.

In *Robertson I*, as noted in the majority opinion, we analyzed several theories of recovery advanced by the

plaintiff, found all but one of them wanting, and reversed for a partial new trial. We conceded that the district court was correct in finding that "all of the liability theories rested upon only one basis for actual damages." *Id.* at 1376. We embraced the statement of the district court that, concerning actual damages, "All roads lead to Rome." *Id.* Instead of remanding for a new trial on all issues, however, we let stand a $750,000 judgment supported by a jury finding of "tortious interference with contract." *Id.* at 1369 & 1376. This was, in my view, an incorrect approach, for the reasons I set forth in my concurrence in *Ledferd v. Dowd*, Nos. 90-2090/2091/2782, slip op. at 32 (8th Cir. Nov. 11, 1992).[1] Although *Ledferd* involved a constitutional tort, the principles and policies I referred to there apply here as well.

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[1] The author of the majority opinion (the author of *Robertson I* and *Robertson II*) states that I disregard the principles of the law-of-the-case. I fully understand his discomfort with my suggestions that errors may possibly have been made at earlier times in this dispute, and, we do deal with the *same* dispute today that we were dealing with in *Robertson I* and *Robertson II*. With the greatest respect, I suggest that there seems to be a modicum of misunderstanding between us on the law-of-the-case doctrine. This circuit has said that the "law-of-the-case doctrine is a discretionary one." *United States v. Callaway*, 972 F.2d 904, 906 (8th Cir. 1992). I concede that a decision in a prior appeal is usually followed "unless . . . the prior decision is clearly erroneous and works a manifest injustice." *Id.* at 905. Or, if the facts have changed since the earlier appeal, the doctrine is not followed. *Little Rock School Dist. v. Pulaski*, 971 F.2d 160, 165 (8th Cir. 1992). I believe we are faced with some change in the facts due to the evidence adduced at the trial level and also with the possibility of manifest injustice to Phillips as the case has now developed. Finally, the doctrine applies only to issues decided by final judgments. *Peterson v. General Motors Corp.*, No. 91-2646, slip op. at 6 (8th Cir. Sept. 16, 1992) (citing *Smith v. Mark Twain Nat'l Bank*, 805 F.2d 278, 286 n. 16 (8th Cir. 1986)). Until we have acted on the appeal before us and all subsequent review has been denied, we have no final order on the issues of punitive damages raised today by Phillips.

II.

As noted by the majority, by the time we looked at this matter again, *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991) (*Robertson II*), *Haslip* had arrived on the scene. The Supreme Court stated that the "rational decisionmaking" required by the due process clause includes jury instructions that adequately guide the jury. *Haslip*, 111 S. Ct. at 1044. "[A]dequate guidance from the court [to the jury] when the case is tried to a jury properly enter[s] into the constitutional calculus." *Id.* at 1043. The "guidance" referred to in *Haslip* included instructions on the purpose of punitive damages, on consideration of the character and degree of wrong of the defendant, and on the necessity of preventing similar wrong. *Id.* at 1037 n.1. The instruction *excluded*, as specifically noted by the Supreme Court, any evidence of the defendant's wealth. *Id.* at 1044.

I earlier expressed my concern about the adequacy of the Arkansas pattern jury instruction on punitive damages in *Union Nat'l Bank of Little Rock v. Mosbacher*, 933 F.2d 1440, 1448 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 870 (1992). Essentially this same instruction was used in both *Robertson* cases and, in my view, the content falls well short of the constitutional requirements outlined in *Haslip*. The standardless approach permitted by the Arkansas instruction, coupled with consideration of an improper element (wealth of the defendant), has prompted the jury to "run wild" in this case and no amount of post-trial judicial review can correct the error.

In *Robertson II*, we rejected Phillips' attack on the punitive damages instructions because only a "general objection that the . . . instructions . . . violated the Fourteenth Amendment" was made. *Robertson II*, 930 F.2d at 1347. After a review of the record, I have difficulty perceiving the Fed. R. Civ. P. 51 violation purportedly committed by

Phillips.[2] Even if we accept the majority view on this, the constitutional overlay brought into play by *Haslip* dictates that this panel review the adequacy of the Arkansas instruction, adequate objection or not, to bring to an end its use in violation of the Fourteenth Amendment.

III.

The most troublesome aspect of the result reached by the majority is the affirmance of a $4,000,000 punitive damages award without an underlying award for compensatory (actual) damages. The law of Arkansas is crystal clear. "[P]unitive damages are not recoverable unless compensatory damages not only have been suffered by the plaintiff but also have been assessed by the jury." *Lake v. Lake*, 562 S.W.2d 68, 69 (Ark. 1978).

Upon retrial subsequent to *Robertson I*, the plaintiff chose to proceed upon only two of its theories of recovery, tortious interference with contract and fraud. Of course, according to *Robertson I*, plaintiff had prevailed on the tortious interference theory and had retained a compensatory damages verdict. Thus, the only issue with regard to this theory, as discussed, was punitive findings. Because we said in *Robertson I* that "[e]ach of these theories . . . would support a different amount of punitive damages, depending upon the conduct involved." *Robertson I*, 871 at 1376, the district court submitted the case to the jury on two separate interrogatories dealing with liability (for fraud) and punitive damages (under both theories). A proper analysis of the facts indicates that we were wrong in *Robertson I* and this directed the district court to a faulty approach in the trial leading to *Robertson II*. If all

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[2] Federal Rule of Civil Procedure 51 requires that "not party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

roads do not now lead to Rome for punishment purposes, and we are really dealing with two discrete intentional torts, each separate punitive award must also be supported by a separate compensatory award. The result reached by the majority, is bottomed on this statement: "It is evident that the jury's deliberations were directed to two different torts and two different injuries, each of which supports an award of punitive damages." Majority Opinion at 17-18 [75a]. To repeat, if we are really dealing with "two different torts [covering two different time periods as stated by the majority] and two different injuries," *id.*, then we need two different compensatory awards, a circumstance not reached in this case.

With respect, however, I think the separate award theory is simply wrong and a single award of punitive damages, if any are indeed due, is the only logical result that can arise from the core of facts presented to the jury by plaintiff. Any way you massage the events at issue, the ultimate damages occurrence in this case is the "loss of the Spe-Dee Mart account." *Robertson I*, 871 F.2d at 1376. The plaintiff is being compensated for that event and the defendant is being punished for bringing it about.

The majority states that the fraud claim is based upon communications and promises leading up to the October 1984 meeting, but not on the meeting itself. Majority Opinion at 20 [77a-78a]. On the other hand, it asserts that it is only the meeting itself that supports the tortious interference claim. *Id.* The pre-October communications, however, would not have been actionable at all had the Spe-Dee Mart account stayed with Robertson. Likewise, the October meeting would have led to naught by way of damages had the Spe-Dee Mart account been retained. The district court was correct; "All roads [do] lead to Rome" for both compensatory and punitive purposes.

The majority says, in essence, that even if this is true, Phillips got what it asked for as a result of its arguments

in *Robertson I*. *Id.* at 19. When I read all the contentions advanced by Phillips and put them in the context of the first trial, I reach a very different conclusion. In *Robertson I*, separate theories of tortious interference, fraud, good faith and fair dealing (intentional acts) and negligence, (unintentional acts) were advanced by Robertson. *Robertson I*, 871 F.2d at 1369. Over the objection of Phillips, the jury was permitted to deliberate on punitive damages based upon all of the theories of recovery presented. *Id.* at 1375. We affirmed only the compensatory award on only the theory of tortious interference. *Id.* at 1377. We remanded for retrial on all other theories. We said that on the instructions given and the verdict form submitted, we could not ascertain the basis upon which the jury made its punitive damages decision. *Id.* Phillips advanced this argument and we agreed with the contention. In addition to the reply brief quotations from *Robertson I* set forth in the majority opinion at 18-19 [75a-76a], Phillips also stated as follows:

> The jury fixing the punitive damages award found that Phillips had breached its duty of good faith and fair dealing. Cast in the language of Court's Instruction No. 15 [App. 124], this finding said that Phillips had violated "standards of decency, fairness, or reasonableness" as well as "good faith" and "honesty" in the performance of a contract. Post trial, the District Court recognized that a directed verdict should have been granted on Interrogatory No. 3 [App. 66] because Phillips, having made no contract to brand the Spe-Dee Mart Stores, could not have breached duties of good faith, decency, fairness and honesty owed only by a contracting party. memorandum Opinion, p. 6. Therefore, the jury was permitted to consider breaches of duty defined in the strongest terms (decency, honesty, fairness, and good faith) in arriving at the punitive

> damages award, when those breaches of duty did not exist as a matter of law.
>
> In light of the District Court's judgment NOV, which has not been appealed, Robertson Oil must argue that whatever conduct is left will now support a $5 million punitive damages award; but this result is contrary to law and manifestly unfair to Phillips. It cannot be ascertained what conduct of Phillips was determined by the jury to merit punishment. Some or all of the punitive damages award may have rested upon Phillips' alleged breach of its duties of decency, honesty, fairness and good faith. Therefore, the general verdict on punitive damages must be reversed, error having been shown. *Dudley v. Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986).
>
> In addition, the mere fact that the jury was permitted to assess punitive damages on the basis of negligent conduct should require reversal of the punitive damages award.

Reply Brief of Appellant at 5-6 (footnote omitted).

An argument that portions of the evidence adduced in *Robertson I* could not have supported a punitive damages award and should be separately considered by the jury in its damages determinations on retrial is not, in the least, at odds with the arguments now advanced by Phillips that under the facts of this case two punitive awards are duplicative because, on damages, including punitive damages, all roads do indeed lead to Rome.

Finally, I agree with the district court's analysis of the scope of judicial review of punitive awards under Arkansas practice. Such a review, however, does not, as I have said, save jury awards based upon the faulty Arkansas pattern instruction.

Thus, I would vacate all awards and remand this matter for a new trial on all issues. Short of this, at least a $4,000,000 injustice will have been done.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 90-1451

ROBERTSON OIL COMPANY, INC.,

Appellee,

v.

PHILLIPS PETROLEUM COMPANY,

Appellant.

Submitted Nov. 12, 1990

Decided April 18, 1991

William H. Sutton, Little Rock, Ark., for appellant.

Julius Glickman, Houston, Tex., for appellee.

Before JOHN R. GIBSON and BOWMAN, Circuit Judges, and HANSON,* District Judge.

JOHN R. GIBSON, Circuit Judge.

Phillips Petroleum Company is again before us appealing from a substantial verdict entered against it and in favor of Robertson Oil Company, Inc. After the first trial, we affirmed an award of actual damages based on intentional interference with a business relationship, but remanded for retrial of the claims for fraud and negligence and the claim

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* The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern District of Iowa, sitting by designation.

for punitive damages for interference. *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989) (*Robertson I*). After a second trial, the jury awarded Robertson $4,000,000 in punitive damages based on intentional interference and $4,000,000 in punitive damages based on fraud. Phillips argues the district court erred in its instruction informing the second jury of the first jury's verdict concerning intentional interference with a business relationship, and in admitting certain evidence relating to punitive damages. Phillips also argues that the punitive damages award is excessive and violates Phillips' right to due process of law. In light of the Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), we remand for further consideration of the amount of punitive damages, and affirm on the instructions and evidentiary questions.

Our earlier opinion recited the evidence in this case in detail, and it is not necessary that we do so again.

I.

Phillips argues that the district court erred in instructing the jury as to what had been concluded by the jury in the first trial. At the beginning of voir dire and again before opening statements, the district court made substantially identical statements summing up the proceedings in the first trial and informing the jury of the issues to be submitted to it. The court stated:

> The previous jury has already decided that there was a valid contract between the plaintiffs, the Robertson Oil Company, and the Spe-Dee Mart outfit, that the defendant, Phillips, knew of that contract, and that Phillips intentionally interfered with that contract by inducing or causing its termination.
>
> The jury also has already found that the plaintiff, Mr. Robertson, was damaged in the amount of

> $750,000, as I already said to you, on account of that loss, and that the defendant, in causing that loss, was not acting in its own fair interest based upon reasonable economic and business considerations, but with intent to cause injury or damage to the plaintiff.
>
> For the purpose of this trial, therefore, you should not question these findings but must accept them as true.
>
> Under the law of Arkansas, the plaintiff has established all the predicates necessary to an award of punitive damages for the wrong of intentional interferences. However, whether any punitive damages should be awarded is for you to decide.

I Tr. at 204 (before opening statements); *see* 1 Tr. at 121-22 (before voir dire). The instruction the court gave before the jury retired to deliberate was to the same effect.[1]

The district court based these instructions on the answer of the jury in the first trial to the following interrogatory:

> Interrogatory No. 4. Do you find from a preponderance of the evidence that Robertson Oil Company

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[1] Court's Instruction No. 15:

I instruct you that you are bound by, and must accept as true, the findings of the previous jury:

(1) That there was a valid contract between Robertson Oil Company and Spe-Dee Mart.

(2) That Phillips Petroleum knew of that contract.

(3) That Phillips intentionally interfered with that contract by inducing or causing its termination.

(4) That, with respect to intentional interference with contract, Phillips was not acting in its own fair interest based upon reasonable economic and business considerations but with intent to cause injury or damage to Robertson Oil Company, and

(5) That Robertson Oil Company was damaged in the amount of $750,000.00.

> had a business relationship or expectancy with the Spe-Dee Mart stores; that Phillips Petroleum Company had knowledge of Robertson Oil's relationship or expectancy with the Spe-Dee Mart stores; that Phillips intentionally and improperly interfered with that relationship; and that Robertson Oil suffered damages which resulted from Phillips Petroleum's intentional and improper interference? You will answer that question "yes" or "no." Robertson Oil Company has the burden of proof on all of these issues except the propriety of the alleged interference. Phillips Oil Company has the burden of proof on the issue of the propriety of the alleged interference.

The first jury had also been instructed on this issue as follows:

> If you find that in making the decision not to allow branding of all the Spe-Dee Mart locations, Phillips was acting in its own fair interest based upon reasonable economic and business considerations and not with intent to cause injury or damage to Robertson, then Phillips was justified in its actions, has not improperly interfered with a business relationship, and has not breached its duty of good faith and fair dealing.

Phillips makes three arguments attacking the instructions given at the second trial. First, it argues that once this court remanded in *Robertson I* to determine whether punitive damages should be awarded, all the facts relevant to the existence of punitive damages had to be relitigated. We simply reject Phillips' interpretation of our panel opinion. In *Robertson I,* we specifically affirmed the actual damages award on the intentional interference claim and remanded for retrial only of the punitive award and the fraud and negligence claims. 871 F.2d at 1377. It was therefore proper for the district court to consider those facts necessary to the intentional interference verdict con-

clusively established at the second trial. The first jury found Robertson had proved the elements of intentional interference and rejected Phillips' defense that its interference was justified. This satisfied the elements of punitive damages under Arkansas law. *See Bruns v. Bruns,* 290 Ark. 347, 719 S.W.2d 691, 694 (1986) (punitive damages are available when there is an intentional violation of another's rights). Nevertheless, whether punitive damages should be awarded was a question for the second jury, *see Toney v. Haskins,* 7 Ark.App. 98, 644 S.W.2d 622, 628 (1983), and was correctly submitted to it. This was done in accordance with our opinion in *Robertson I.*

Phillips next argues that in the second trial the court improperly instructed the jury that Robertson had already proved the interference was not justified, whereas under Arkansas law the burden was on Phillips to prove justification as an affirmative defense. *See Walt Bennett Ford, Inc. v. Pulaski County Special School Dist.,* 274 Ark. 208, 624 S.W.2d 426, 429 (1981). Phillips argues that the fact that it failed to persuade the jury that Phillips' behavior was *justified* does not necessarily mean that the jury was persuaded that the behavior was *unjustified;* the jury may have felt that it did not have sufficient evidence one way or the other and therefore resolved the issue against Phillips, the party with the burden of proof. Therefore, Phillips says, the instruction misled the second jury by stating that the first verdict established the impropriety of Phillips' actions.

We are unpersuaded by this argument because of the particular instructions given at the first trial. The key interrogatory actually phrased the elements in such a way as to require the jury to find affirmatively that Phillips' conduct was improper.[2] Admittedly, after the substantive

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[2] The interrogatory asked: "Do you find from a preponderance of the evidence . . . that Phillips intentionally and improperly interfered with [the Spe-Dee Mart relationship]"?

part of the interrogatory, the court stated that Phillips bore the burden on "propriety," but considering the instruction as a whole, *see Circle J Dairy, Inc. v. A.O. Smith Harvestore Prods., Inc.*, 790 F.2d 694, 698 (8th Cir. 1986), we hold that the district court's instructions in the second case were a fair summary of the first jury's verdict on the interrogatory.

Phillips also argues that the justification instruction in the first trial required the jury to find both that Phillips was acting (1) in its own interests and (2) not with intent to cause injury or damage to Robertson, and that therefore its verdict against Phillips could have been based on a finding of only one of these two facts. Phillips argues from this that it was error for the district court to instruct the second jury that the first jury had found both these facts to be true. The district court considered this argument before the second trial and correctly refuted it by observing that what Phillips considers to be alternative facts are really two sides of the same coin: "[T]hese are not additional facts. . . . They are the same fact. In other words, if it was acting in its own fair interest it was not with intent to cause injury. But if it was not acting in its own fair interest it was with the intent to cause injury." Both phrases were simply ways of describing the absence of justification, and the district court did not err in instructing the second jury that these facts had been found.

In summary, the district court did not err in instructing the second jury that the first jury had found all the elements necessary for punitive damages.

II.

Phillips argues that the district court erred in permitting Mr. Robertson to testify about his financial woes, including Internal Revenue Service liens and overdue bank loans, which he claims resulted from Phillips' actions. The district court permitted introduction of this evidence as pertinent

to the circumstances surrounding Phillips' actions. *See Holmes v. Hollingsworth,* 234 Ark. 347, 352 S.W.2d 96, 99 (1961). Phillips argues that the evidence was irrelevant, since compensatory damages were not at issue in the second trial, and the financial problems were not shown to be caused by Phillips' acts. "In ruling on the admissibility of evidence, the trial judge has a wide discretion, and his decisions will not be disturbed unless there is a clear and prejudicial abuse of discretion." *Roth v. Black & Decker, U.S., Inc.,* 737 F.2d 779, 783 (8th Cir. 1984) (citation omitted). We see no abuse of discretion in allowing Robertson to testify about what he claims were the results of Phillips actions.

Phillips also argues that the district court erred in permitting Robertson to produce certain expert testimony, specifically as to what size punitive award against a company with Phillips' net worth would be comparable to a $2, $100 or $1,000 award against a "common worker". This testimony was offered as an explanation of what the figures in Phillips' financial statements meant. Robertson's expert also testified about statements from Phillips' 1988 annual report, stating the company's opinion that pending litigation would have no material adverse effect" on Phillips' financial position.

The district court must determine under Fed.R.Evid. 702, whether an expert's opinion will assist the trier of fact. The district court exercises discretion in this determination, *see Haynes v. American Motors Corp.,* 691 F.2d 1268, 1272 (8th Cir. 1982), and we hold that it did not abuse its discretion in admitting either the expert testimony or the testimony about the financial statements.

III.

Phillips argues that the punitive damages award was excessive and that, because Arkansas law has no definite standard for setting the amount of punitive damages, the

award violates Phillips' due process rights. While this appeal was pending, the Supreme Court decided *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), which bears directly on Phillips' punitive damages arguments. Under *Haslip* we must evaluate both the jury instructions as to the punitive damages award and the adequacy of judicial review of the jury's award.

Under Arkansas law, the purpose of punitive damages is to be a sufficient punishment to deter the wrongdoer and others from similar conduct. *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518, 523 (1972).

> "[T]he nature, extent, and enormity of the wrong, the intent of the party committing it, and, generally, all the circumstances attending the particular transaction involved, including any mitigating circumstances which may operate to reduce without wholly defeating such damages, may be taken into consideration, and so, as a rule, may the financial and social condition and standing of the party."

Holmes v. Hollingsworth, 352 S.W.2d at 99 (quoting 15 Am.Jur. *Damages* § 296 (1938)). The amount of the compensatory damages award is also relevant under Arkansas law. *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453, 458 (1983).

The trial court must review the award to determine if the amount of the award " 'shocks the conscience of the court or demonstrates that the jurors were motivated by passion or prejudice.' " *O'Neal Ford, Inc. v. Davie*, 299 Ark. 45, 770 S.W.2d 656, 659 (1989) (quoting *W.M. Basklin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526, 534 (1982)).

On appeal, the reviewing court can also reduce the amount of punitive damages, should it find the judgment entered by the trial court excessive. *See e.g., Holmes*, 352 S.W.2d at 100 (reducing punitive award on appeal); *Willis*

v. Elledge, 242 Ark. 305, 413 S.W.2d 636, 640 (1967) (same). *Cf. First Commercial Bank v. Kremer,* 292 Ark. 82, 728 S.W.2d 172, 177 (1987) (further reviewing award already reduced by remittur in the trial court).

We conclude that the instruction given the jury in this case was comparable to that approved in *Haslip,* but that in any case, Phillips waived any defect in the instruction by failing to offer a more detailed instruction or otherwise bring the alleged deficiency to the district court's attention.

The district court instructed the jury that the purposes of punitive damages were "to punish a wrongdoer and to deter others from similar conduct." The court also stated that the jury might consider Phillips' financial condition as shown by the evidence. *Id.* Thus, the court instructed the jury on the purposes of punitive damages in language substantially similar to that approved in *Haslip. See* ___ U.S. at ___ n.1, ___, 111 S.Ct. at 1037 n.1, 1044. However, the instructions only informed the jury that Phillips' financial condition could be considered, without also instructing it to take into consideration the character and degree of the wrong. *See* at ___ n.1, 111 S.Ct. at 1037 n.1. Although Phillips made a general objection that the court's instructions on punitive damages violated the fourteenth amendment, Phillips' requested instruction did not elaborate any further on the standard for setting the amount of punitive damages.[3] While we recognize that a party need not tender specific language if it has otherwise objected to an inadequacy in an instruction, *see Elmore v. United States,* 843 F.2d 1128, 1133 (8th Cir. 1988), we believe the overall record here shows that Phillips did not comply with Fed.R.Civ.P. 51 by bringing to the court's attention the need for the jury to consider the nature and

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[3] The instruction given and Phillips' offered instruction were both based on the Arkansas form instruction with minor variations.

degree of the wrong. Therefore, we do not believe *Haslip* requires a new trial on this new issue.

On the other hand, *Haslip* also stresses the importance of the trial and appellate courts' roles in scrutinizing punitive damages awards. ___ U.S. ___, 111 S.Ct. at 1044. In this case, Phillips filed a motion for remittitur, which the district court denied summarily. *Robertson Oil Co. v. Phillips Petroleum Co.*, No. 86-2120 (W.D. Ark. March 2, 1990). We are thus unable to evaluate the adequacy of the district court's review of the award. In light of the intervening decision in *Haslip*, together with the Supreme Court's actions in remanding numerous cases for reconsideration in light of *Haslip*, *see* ___ U.S. ___ - ___, 111 S.Ct. 1298-1299, 113 L.Ed.2d 233-240 (1991),[4] we deem it advisable to remand for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip*, ___ U.S. at ___, 111 S.Ct. at 1044, as well as principles enumerated in the Arkansas cases.

Accordingly, we affirm as to the instructions and evidentiary issues, but remand for further consideration by the district court of the propriety of the punitive damages award.

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[4] The Supreme Court granted certiorari, vacated and remanded for consideration in light of *Haslip* seven cases: *Reserve Life Ins. Co. v. Eichenseer*, ___ U.S. ___, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991); *Hospital Auth. v. Jones*, ___ U.S. ___, 111 S.Ct. 1298, 113 L.Ed.2d 234 (1991); *Pacific Light. Corp. v. MGW Inc.*, ___ U.S. ___, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991); *Portec Inc. v. The Post Office*, ___ U.S. ___, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991); *Clayton Brokerage Co. v. Jordan*, ___ U.S. ___, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991); *Int'l Soc'y of Krishna v. George*, ___ U.S. ___, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991); *Church of Scientology v. Wollersheim*, ___ U.S. ___, 111 S.Ct. 1298, 113 L.Ed.2d 234 (1991); and denied certiorari in two Alabama cases: *General Am. Life Ins. Co. v. Simmons*, ___ U.S. ___, 111 S.Ct. 1305, 113 L.Ed.2d 240 (1991); *Massachusetts Mut. Life Ins. Co. v. Collins*, ___ U.S. ___, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991); dealing with punitive damages.

APPENDIX E

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 88-1266

ROBERTSON OIL COMPANY, INC.,

Appellee,

v.

PHILLIPS PETROLEUM COMPANY,

Appellant.

Submitted Sept. 15, 1988

Decided March 31, 1989

As Amended on Denial of Rehearing and Rehearing En Banc June 29, 1989

William H. Sutton, Little Rock, Ark., for appellant.

Julius Glickman, Houston, Tex., for appellee.

Before JOHN R. GIBSON, Circuit Judge, and BRIGHT and HENLEY, Senior Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Phillips Petroleum Company appeals from a verdict against it which awarded Robertson Oil Company $750,000 in actual damages and $5,000,000 in punitive damages. The jury in this diversity action found that Phillips was liable for fraud, breach of its duty of good faith and fair dealing, tortious interference with the relationship between Robertson and its client, Spe-Dee Mart, and negligence. The jury failed to agree on whether Phillips had breached an

oral contract, and on this issue a mistrial was declared. The district court on post-trial motions entered a judgment notwithstanding the verdict on the breach of the duty of good faith and fair dealing theory. For reversal Phillips argues principally that the evidence was insufficient to support a verdict of fraud and tortious interference, that as a matter of law Phillips was not negligent nor did it breach an oral contract, and that the verdicts were inconsistent. Phillips also contests the general verdict on compensatory and punitive damages and attacks the constitutionality of the punitive damage award. We affirm the district court's rulings that there were submissible claims of fraud, tortious interference with the relationship between Robertson and Spe-Dee Mart, and negligence. We conclude, however, that both the inconsistencies between the findings of negligence and fraud, and the judgment notwithstanding the verdict on the breach of duty of good faith and fair dealing theory, undermine the basis for the jury's punitive damage award, and we must remand these issues for retrial. As the tortious interference claim supports the actual damages, we affirm the award of actual damages.

I.

Robertson Oil, solely owned and managed by Butch Robertson, is an independent distributor or jobber of petroleum products in the area of Fayetteville, Arkansas. For seven years, Robertson sold gasoline to twenty-three Spe-Dee Mart outlets, which accounted for 65% of Robertson's total business. Phillips' gas is marketed by jobbers on a branded and unbranded basis. Gas is considered branded if the Phillips trademark and logo are exhibited, and unbranded if the outlet, such as Spe-Dee Mart, displays its own logo. During the seven-year period, Spe-Dee Mart bought approximately 99% of its gas through Robertson, all of which was unbranded. In May of 1984 Spe-Dee Mart asked Robertson to convert all twenty-three Spe-Dee Mart

stores from unbranded to branded Phillips outlets. Robertson immediately telephoned Jerome Lewis, the regional sales manager for Phillips, and told him of Spe-Dee Mart's desire to be branded by Phillips. Robertson testified that Lewis, who admittedly had the final authority to approve the requested branding of Spe-Dee Mart, answered: "There will be no problem with it. If it meets our image standards, we'll do it." Robertson testified that Lewis went on to say that Robertson should submit a letter through normal channels and "when it got to him he would approve it." (Tr., Vol. 1, 42, 54, 112). Robertson then sent a letter regarding the branding to Dave Howard, the Phillips marketing representative, as is consistent with formal operating procedures.

Robertson testified that he spoke with Lewis by telephone on several occasions during the months of June through August, 1984, and that on each occasion Lewis assured Robertson that all twenty-three of the Spe-Dee Mart stores would be branded by Phillips. Robertson summarized Lewis's response in the several calls by testifying that when Lewis was asked about branding, he stated: "Don't worry about it, it's taken care of," and "It's no problem." (Tr. Vol. 1, 54). Robertson testified that at a Memorial Day golf outing arranged by Robertson in Tulsa, Oklahoma, he asked Lewis about the status of his proposal and Lewis said "it was in the mill" and he would "be over in October and take care of it." (Tr. Vol. 1, 57). Neither Lewis, Howard, nor Bob Likens, also an agent of Phillips, disclosed to Robertson at this time that they were privately discussing among themselves their reservations on the branding deal. Although Howard prepared a proposed memo to be sent to Robertson revealing Phillips' intentions concerning the branding agreement. Howard testified that he never sent it.

Robertson then scheduled a meeting for October, 1984 in Fayetteville between Robertson, Spe-Dee Mart, and Phillips, to formally close the agreement to brand the Spe-

Dee Mart stores. The day before the meeting, Lewis informed Robertson that only three of the twenty-three Spe-Dee Mart stores could be branded because they were giving John Johnson, the Phillips jobber in Springdale, Arkansas, six months to exclusively develop the Rogers territory.

The next day Lewis, Likens, and Howard attended the scheduled meeting with Robertson and Spe-Dee Mart's owners, Hoyet and Stanley Greenwood. There, Lewis told the Greenwoods that Phillips was not going to brand all of their stores, but only three. Likens testified that Lewis then informed the Greenwoods that "they would take a look down the road again to see if * * * [they] were happy, if there had been any improvements in Butch's performance, and if Greenwood performed, then * * * [they] would consider others at a later date." (Tr. Vol. 3, 110). The Greenwoods reached the conclusion during this meeting that Phillips "had a problem" with Robertson and that he was "probably insolvent" because they could think of no other reason why Phillips would not brand all of the Spe-Dee Mart stores. (Tr. Vol. 2, 2). Greenwood also testified that he felt Phillips did not want their business. After the meeting, the Greenwoods began to search for another refiner with whom to brand. Although Robertson later offered to brand Spe-Dee Mart through Conoco in January, 1985, the Greenwoods declined Robertson's offer.

After the October meeting John Johnson, according to Stanley Greenwood, solicited the Spe-Dee Mart business. Greenwood, however, declined the offer and informed him that they would continue business with Robertson. Hoyet Greenwood testified that a Phillips representative later contacted him and offered to brand the Spe-Dee Mart outlets, but that Spe-Dee Mart had already reached a branding agreement with Unocal. Following Spe-Dee Mart's branding with Unocal, Robertson lost all present and expected Spe-Dee Mart business, which had accounted for approximately sixty-five percent of his revenues.

These several conversations between Robertson and Phillips employees led Robertson to file a multi-count claim against Phillips, alleging breach of an express oral and written contract, breach of the duty of good faith and fair dealing, tortious interference with a business relationship or expectancy, breach of fiduciary duty, actual fraud, constructive fraud, negligent misrepresentation, conspiracy, prima facie tort and negligence. At the close of Robertson's case, the district court granted Phillips' motions for directed verdict on the theories of breach of written contract, breach of fiduciary duty, negligent misrepresentation, prima facie tort and conspiracy. At the close of all the evidence, the district court denied Phillips' motions for directed verdicts on each of the remaining theories, including Robertson's prayer for punitive damages.

The district court then submitted the case to the jury. In answers to special interrogatories, the jury could not agree on whether Phillips had made an oral promise to Robertson, and the district court declared a mistrial on that issue. The jury found Phillips liable for fraud, breach of the duty of good faith and fair dealing, tortious interference and negligence. It determined that Phillips was seventy percent responsible and Robertson Oil thirty percent responsible for the occurrence and any damages resulting from it, and returned a verdict of $750,000 in compensatory damages and $5,000,000 in punitive damages against Phillips. Final judgment was entered against Phillips in accordance with the compensatory and punitive damages awards of the jury.

Phillips then moved for a directed verdict on the oral contract theory on which the district court had declared a mistrial, and motions for judgment notwithstanding the verdict or for a new trial on the issues of fraud, tortious interference, breach of the duty of good faith and fair dealing and negligence. The district court granted judgment, notwithstanding the verdict in Phillips' favor on the breach of the duty of good faith and fair dealing theory,

but rejected Phillips' request for relief on the remaining counts. Phillips now appeals each adverse decision of the district court.

II.

Phillips first argues that the district court erred in denying its motion for judgment notwithstanding the verdict on the fraud theory. We have had frequent occasions to state our standard of review of the submissibility of a case. We may find for Phillips only if:

> "all of the evidence points one way and is susceptible of no reasonable inferences sustaining the position" of [Robertson]. Furthermore, we must resolve direct factual conflicts in favor of [Robertson], assume as true all facts in [its] favor which the evidence tends to prove, and give [it] the benefit of all reasonable inferences. We may not find for [Phillips] if the evidence so viewed would "allow reasonable jurors to differ as to the conclusions that could be drawn."

Craft v. Metromedia, Inc., 766 F.2d 1205, 1218 (8th Cir. 1985) (citations omitted); *cf. Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988). Where there is substantial evidence to support the jury's verdict, we must uphold that verdict. *Washburn v. Kansas City Life Ins. Co.*, 831 F.2d 1404, 1411 (8th Cir. 1987).

Phillips alleges that at trial Robertson failed to establish the existence of an intentional misrepresentation of fact by Phillips and justifiable reliance upon such a misrepresentation by Robertson. These are essential elements of fraud under Arkansas law. *See Merrill Lynch v. First Nat'l Bank of Little Rock*, 774 F.2d 909, 913 (8th Cir. 1985).

Robertson's claim of fraud is premised upon conversations he had with Lewis concerning the branding of Spe-Dee Mart. According to Robertson, Lewis told him in May that Phillips would brand all of the Spe-Dee Mart outlets

and continued throughout the summer to assure him in telephone conversations and at a golf game that they would brand. Finally, at an October meeting, Lewis informed Robertson for the first time that Phillips would not brand Spe-Dee Mart.

The evidence in this case, however, is hotly disputed. While Lewis has almost no memory of any of the conversations. Howard testified that he informed Robertson there could not be an agreement to brand all twenty-one of the outlets, especially those close to other outlets branded by Phillips. Likens testified that he was opposed to the branding request at the outset because of difficulties he had with Robertson over both branding violations and overages and underages in orders. In evaluating the submissibility of Robertson's claim, we cannot pass upon issues of credibility, nor do we accept Phillips' argument that certain uncontradicted portions of testimony of its witnesses must be given conclusive weight.

Phillips first attacks the jury's finding that Phillips intentionally misrepresented a material fact to Robertson, focusing on Lewis' initial statement that "[t]here will be no problem with it. If they meet our image standards, we'll do it." Phillips contends that this expressed no more than an optimistic response to Robertson's branding proposal and his sincere opinion that Phillips would brand the Spe-Dee Mart stores in the future. Relying on *Anthony v. First Nat'l Bank*, 244 Ark. 1015, 1024, 431 S.W.2d 267, 272 (1968), Phillips maintains that Lewis' statements were promises and concerned events to occur in the future, and that they therefore do not support an action for fraud.

The rule in *Anthony*, however, does not apply if one makes a promise knowing at the time that it will be kept, and injury results to the person relying on the promise. *See Victor Broadcasting Co. v. Mahurin*, 236 Ark. 196, 202, 365 S.W.2d 265, 269 (1963). Thus, to establish a submissible case of fraud, it is critical that Robertson establish

not only a misrepresentation, but also Phillips' knowledge that the promise would not be kept.

We entertain some questions as to whether the initial statement made by Lewis, that there "would be no problem" obtaining branding, constitutes fraud, since it was qualified by the reference to Spe-Dee Mart meeting Phillips' image standards. Further, Lewis's statements indicating that he would approve the branding deal when it got to him presupposes additional activity on the part of others before he could perform the promise. Additionally, Lewis's statement at trial that he "had no intentions either way in 1984" to brand or not brand leaves the question somewhat indefinite.

When we consider, however, the later telephone conversations throughout June, July, and August during which Lewis assured Robertson that he should not worry about branding as "it's taken care of" and "it's no problem," the jury could conclude that Lewis's assurances were not simply optimistic opinions, but instead statements of fact. When Lewis made these assurances, there was evidence from which a jury could infer that Likens and Howard had discussed their reservations on the Robertson branding deal. Likens testified that he was opposed to Robertson's branding proposal from the beginning because of earlier problems with Robertson concerning branding violations. Similarly, Howard testified that Phillips decided not to brand all the Spe-Dee Mart Stores in May or June, and that he drafted a letter to Robertson expressing Phillips' reservations on the branding deal but never sent it. From this evidence we are satisfied that the jury could find that a promise had been made by Phillips and that it knew at the time it was made that the promise would not be kept.

Phillips also contends that Robertson presented insufficient evidence of its justifiable reliance on Phillips' representations. Phillips maintains that Robertson knew there was a possibility that he would not receive branding for

Spe-Dee Mart, because he did not inform Spe-Dee Mart that their request to brand with Phillips had been or would be granted. The district court, however, determined that Robertson made a submissible showing of reliance. Robertson did not seek another supplier to brand Spe-Dee Mart during the entire negotiation period with Phillips from May until October. Additionally, Robertson, believing Phillips was ready to close the branding agreement, set up the October meeting, at which he was embarrassed and discredited in front of his client. Consequently, Robertson lost the Spe-Dee Mart account. We conclude that the record supports the jury's finding that Robertson justifiably relied on Phillips representations and that Phillips was therefore liable for fraud.

III.

Phillips next contends that the evidence was insufficient to support a jury verdict that Phillips tortiously interfered with the business relationship of Robertson and Spe-Dee Mart. We have identified the elements of this tort under Arkansas law as follows:

> (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resulting damage to the party whose relationship or expectancy has been disrupted.

McGee v. Hester, 724 F.2d 89, 92 (8th Cir. 1983). Phillips challenges only one of these four elements, denying that it intentionally interfered with the business relationship between Spe-Dee Mart and Robertson. We conclude that there was sufficient evidence in the record to support the jury's finding.

The testimony of Stanley Greenwood, co-owner of Spe-Dee Mart, reveals that before the October meeting Spe-

Dee Mart had prepared its stores for evaluation by Phillips and expected to be branded by Phillips, with Robertson acting as their jobber. At the October meeting Phillips informed Spe-Dee Mart for the first time that only three of their stores would be branded. At this time, Phillips knew that the contract between Spe-Dee Mart and Robertson depended on the branding of all the Spe-Dee Mart stores. Likens testified that at this meeting Lewis questioned Robertson's ability to perform the contract and then informed the Greenwoods that "if there had been improvements in Butch's performance, and if Greenwood performed then they would consider [branding] others at a later date." These statements caused the Greenwoods to lose confidence in Robertson's abilities on the belief that Phillips "had a problem" with Robertson and that Robertson must be "financially insolvent." The Grenwoods refused to deal with Robertson when they found another supplier, Unocal, with whom they could brand. We conclude that these facts alone are sufficient evidence to support the jury finding of intentional tortious interference by Phillips.[1]

IV.

Phillips also argues that the jury's finding of negligence must be reversed because Phillips owed no duty to Robertson as a matter of law. Robertson described the alleged duty as one to timely notify Robertson of Phillips' decision not to brand all of the Spe-Dee Mart stores. The district court followed this reasoning in denying Phillips' motion

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[1] Phillips also contends that there is insufficient evidence for the jury to find that Robertson's damages were proximately caused by Phillips. We conclude from a careful review of the evidence that a jury could find that Phillips' actions in its negotiations for the branding of Spe-Dee Mart caused Robertson to lose the Spe-Dee Mart account, and that Spe-Dee Mart's agreement to brand with Unocal was concluded at a later time. The extent of damages was for jury determination.

for judgment notwithstanding the verdict on the negligence theory.[2]

Phillips contends that under Arkansas law, silence and inaction by an offeree in a contract implies a rejection of the offer after a reasonable lapse of time. *See Reliance Bagging Co. v. Electric Gin Co.*, 208 Ark. 829, 832, 187 S.W.2d 724, 726 (1945). Because Phillips offered no definite answer to Robertson's proposal to brand Spe-Dee Mart, Phillips maintains that this constituted rejection and it had no duty to notify. According to Arkansas law, however, a defendant becomes subject to a duty to act carefully if he gratuitously undertakes an act. *See Haralson v. Jones Truck Line*, 223 Ark. 813, 816-87, 270 S.W.2d 892, 895 (1954); *Mandel v. United States*, 793 F.2d 964, 968 (8th Cir. 1986), (applying Arkansas law). The evidence reveals that Phillips affirmatively acted by repeatedly assuring Robertson that they would brand from May to October. Thus, while Phillips had no duty to brand, Robertson has made a sufficient showing that Phillips was under a duty to inform Robertson that it would not brand. We affirm the ruling of the district court that there was a submissible issue of negligence.

V.

Phillips next argues that the jury's findings of both fraud and negligence are inconsistent and that a new trial is required. Although we have determined that Robertson has

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[2] The district court, in ruling that there was a submissible issue of negligence, stated:

> Plaintiff contended that Phillips unreasonably delayed in conveying its intention not to brand Spe-Dee Mart and let plaintiff believe for too long that its request held a good probability of being met. It was within the power of the jury to consider the evidence of the parties' dealings and the practices of their respective businesses and to determine that Phillips was negligent in its handling of the subject negotiations and transactions with the plaintiff.

made submissible cases of fraud and negligence, we believe that such findings are inconsistent with each other. Special answers or findings by the jury must be consistent with each other, and if they are irreconcilably inconsistent, they destroy each other. *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155, 157 (8th Cir.), *cert. denied*, 439 U.S. 864, 99 S.Ct. 187, 58 L.Ed.2d 173 (1978). Although it is the duty of the courts to make every reasonable effort to harmonize the answers, we cannot do so here. *Cf. Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618 (1963).

Under Arkansas law, fraud is an intentional tort which requires "knowledge or belief" that the representation is false with "an intention to induce" the plaintiff to act on reliance. *See Merrill Lynch v. First Nat'l Bank of Little Rock*, 774 F.2d 909, 913 (8th Cir. 1985) (citing Arkansas law).

In this case, the jury returned an affirmative answer to special interrogatory 2, which stated:

> Do you find by a preponderance of the evidence that Phillips Petroleum Co. made a false representation of a material fact, that Phillips Petroleum had knowledge or believed that the representation of fact was false, or else recklessly and without regard to its truth or falsity asserted it as being true; that Phillips intended to induce Robertson Oils reliance on the misrepresentation that Robertson Oil justifiably relied on the misrepresentation; and that Robertson Oil suffered damages?

Thus, the jury could find Phillips liable for fraud only if it falsely represented to Robertson that it would brand all of the Spe-Dee Mart Stores, intending to induce it to rely on the misrepresentations, when it had already determined that it would not brand the stores.

Negligence, by contrast, is not an intentional tort, *see Seaman Store Co. v. Bonner*, 195 Ark. 563, 569, 113 S.W.2d

1106, 1109 (1938), and is defined as the failure to exercise the ordinary care which a reasonably careful person would use under similar circumstances. *See Dongary Holstein Leasing Inc. v. Covington*, 293 Ark. 112, 117, 732 S.W.2d 465, 468 (1987). Thus, the theories underlying fraud and negligence are antithetical. An act or failure to act cannot be both intentional and unintentional. We should not stop at this point, however, as we must examine the specific elements of fraud and negligence at issue in this case. We have some difficulty in analyzing the inconsistency here, as the negligence instruction was general and there was no instruction setting out the elements of the negligence claim. Accordingly, the jury did not make specific factual findings as to the acts or omissions constituting Phillips' negligence.[3] We must look to the reasoning of the district court and the position of the parties to ascertain the basis for the negligence claim. As we previously observed in Part V, the essence of the negligence claim is that Phillips unreasonably delayed in conveying its intention not to brand Spe-Dee Mart and let Robertson believe for too long that "its request held a good probability of being met."

A finding of fraud required findings that Phillips falsely represented to Robertson that it would brand all of the

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[3] The negligence interrogatory No. 5A read as follows: "Do you find from a preponderance of the evidence that Phillips Petroleum Co. was negligent and that that negligence was a proximate cause of injury to Robertson Oil Company?" The district court's instruction concerning negligence further stated:

> When I use the word "negligence" in these instructions, I mean the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do, under circumstances similar to those shown by the evidence in this case. To constitute negligence, an act must be one from which a reasonably careful person would foresee such as appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner.

Spe-Dee Marts, knowing at the time that it could not honor its promise, and that Phillips intended to induce Robertson to rely on the representation. A finding of negligence, on the other hand, required that Phillips did no more than fail to exercise ordinary care in informing Robertson of its decision not to brand. This difference between the intentional tort of fraud and the inadvertent action of negligence thus points to a necessary inconsistency between the factual findings in this case.[4] Thus, the jury could find one or the other proposition, but not both. The jury was not instructed, however, that it could return a verdict on only one of the two inconsistent theories.

We are therefore satisfied that we must reverse both the negligence and fraud verdicts and remand the issues for a new trial. At that time, the jury should be instructed that a finding of negligence will stand only on findings that are not inconsistent with those findings required for fraud. *See Jim Halsey Co. v. Bonar,* 284 Ark. 461, 683 S.W.2d 898 (1985). The tension between the two theories may require a further articulation of the elements of negligence. We leave this issue to the district court on retrial.[5]

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[4] This inconsistency between a negligent representation and a fraudulent representation is recognized in the *Restatement (Second) of Torts* § 528 (1977), which states: "A representation that is believed to state the truth but which because of negligent expression states what is false is a negligent but not a fraudulent misrepresentation." Arkansas courts have relied upon the Restatement in the tort field. *See Pinkston v. Lovell,* 296 Ark. 543, 548-50, 759 S.W.2d 20, 22-23 (1988); *Kelly v. Wiggins,* 291 Ark. 280, 293, 724 S.W.2d 443, 450 (1987).

[5] Phillips also contends that the jury's inability to find thst a promise was made in interrogatory no. 1 (the contract and promissory estoppel issues) is inconsistent with the finding that a fraudulent representation was made in interrogatory no. 2 (the fraud issue). There is, however, no inconsistency as a jury's failure to reach a verdict on one interrogatory does not prevent a court from accepting other properly answered interrogatories. *See Bridges v. Chemrez Specialty Coatings, Inc.,* 704 F.2d 175, 180 (5th Cir. 1983). *See also Skyway Aviation Corp. v. Minneapolis Northfield & So. Ry. Co.,* 326 F.2d 701, 704 (8th Cir. 1964)

VI.

Finally, Phillips appeals both the compensatory and punitive damage awards. Because there was a general verdict, it is not possible to segregate the various theories to determine which among them supported the jury's award of punitive and compensatory damages. While we have affirmed the theory of tortious interference with a business relationship, three other theories of liability no longer stand. Any or all of these theories of liability, the duty of fair dealing and good faith set aside by the district court, and the fraud and negligence findings which we have held to be inconsistent, may have provided the basis for the jury's damage award.

For reversal, Phillips relies on *Dudley v. Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986), where we held "that when one of two theories has erroneously been submitted to the jury a general verdict cannot stand." *See also Bone v. Refco, Inc.*, 774 F.2d 235, 242 (8th Cir. 1985). In *Dittmer* two theories of liability, fraud and market manipulation, were submitted to the jury. One theory, fraud, was found to be erroneously submitted to the jury. Because the jury in *Dittmer* returned a general verdict, the court was unable to determine the extent to which the verdict rested on the improperly submitted fraud theory, or whether the jury would have granted the same award had the case been submitted on the proper theory alone. Thus, the court concluded the general verdict could not stand.

In analyzing the punitive damage award, we conclude that the rule in *Dittmer* is applicable here. Punitive damages are not intended to compensate an injured party, but to punish and deter conduct of the offending party. *Holmes v. Hollingsworth*, 234 Ark. 347, 350, 352 S.W.2d 96, 98 (1961). The instruction given to the jury on punitive dam-

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(failure to agree on unanswered interrogatories does not vitiate otherwise unanimous verdict effectively disposing of the issues submitted).

ages required them to find that Phillips "intentionally pursued a course of conduct for the purpose of causing harm."[6] The Arkansas Supreme Court in discussing the elements of punitive damages has stated:

> "In assessing exemplary damages the nature, extent, and enormity of the wrong, the intent of the party committing it, and, generally, all the circumstances attending the particular transaction involved, including any mitigating circumstances which may operate to reduce without wholly defeating such damages, may be taken into consideration, and so, as a rule, may the financial and social condition and standing of the party."

Holmes, 234 Ark. at 352, 352 S.W.2d at 99 (quoting 15 Am.Jur. *Damages* § 298 (1938)). In *Ray Dodge, Inc. v. Moore*, the curt further held:

> "The amount of actual damages sustained by a plaintiff is one indication of the culpability of the defendant's acts, but it cannot be the sole criterion for the assessment of punitive damages. Also relevant is the prospective deterrent effect of such an award upon persons situated similarly to the defendant, the motives actuating the defendant's conduct, the degree of calculation involved in the defendant's conduct, and the extent of the defendant's disregard of the rights of others."

251 Ark. 1036, 1045, 479 S.W.2d 518, 523-24 (1972) (quoting *Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 453 P.2d 551 (1969)).

The conduct of Phillips relevant to an award of punitive damages necessarily differs according to the various the-

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[6] This language is based upon the standard for malice established by the Arkansas Supreme Court in *Chicago, Rock Island & Pacific Ry. Co. v. Whitten*, 90 Ark. 462, 468, 119 S.W. 835, 837 (1909).

ories of liability on which the jury based its verdict. Because the punitive damage issue was submitted in the form of a general verdict, however, we cannot ascertain what conduct of Phillips was determined by the jury to merit punitive damages. Some or all of the punitive damage award may have rested upon theories improperly submitted to the jury. Thus, under *Dittmer*, we have no alternative but to reverse the punitive damage award and remand the issue to the district court. Upon retrial, the jury should be instructed that a finding of negligence alone is not enough to support an award of punitive damages as it requires intentional action by Phillips.[7]

The district court correctly analyzed that all of the liability theories rested upon only one basis for actual damages, the loss of the Spe-Dee Mart account. As the district court succinctly stated concerning actual damages: "All roads lead to Rome." We have no quarrel with this analysis. Although the district court set aside the good faith and fair dealing theory, and although we have held the negligence and fraud theories to be inconsistent, the tortious interference theory was submitted to the jury without error and supports the actual damage award. In *Dittmer*, each theory submitted to the jury caused the plaintiff separate and distinct injuries. Consequently, the court was unable to determine the extent to which the verdict rested on an improperly submitted theory. Here, however, the same injury sustained all theories and we are satisfied that *Dittmer* does not bar the actual damage award.

We are troubled, however, with the interplay between the considerations involved in compensatory and punitive damages. As we have explained above, the conduct of a

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[7] Phillips also maintains that the punitive damage award should be reversed because it violated its due process rights, and it was excessive under the Eighth Amendment. Because we remand the punitive damage issue to the district court for a new trial, we need not consider these arguments.

defendant determines the amount of punitive damages. The tortious interference with a business relationship, fraud, and good faith and fair dealing theories, all intentional torts which support the punitive damage award, each involve different conduct. Each of these theories therefore would support a different amount of punitive damages, depending upon the conduct involved. Further, the Supreme Court of Arkansas has stated that the amount of actual damages sustained by a plaintiff is one indication of the "culpability of the defendant," although not the sole criterion in assessing punitive damages. *Ray Dodge,* 251 Ark. at 1045, 479 S.W.2d at 524. Because retrial of the punitive damage award will necessarily involve full development of Phillips' conduct, and because actual damages contribute to the determination of punitive damages and are a required foundation for such damages, *see Bell v. McManus,* 294 Ark. 275, 277, 742 S.W.2d 559, 560 (1988), we have carefully considered whether the best course is simply to require a retrial of all damages issues. We conclude, however, that as the award of actual damages is fully supported by the tortious interference with contract verdict, it should stand. The district court may by proper instructions inform the jury as to the relationship between actual damages and punitive damage considerations.[8]

VII.

In sum, we affirm the district court's determination that Robertson made a submissible case on the fraud, tortious interference, and negligence claims, and uphold the district court's denial of a directed verdict on the oral contract theory. Because of inconsistencies in the jury's fraud and negligence findings, however, we must remand those issues

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[8] Because we affirm the award of actual damages, we need not consider Phillips' argument that it was entitled to a directed verdict on Robertson's oral contract theory, as this theory can only support the award of actual damages.

for a new trial. Because we are unable to determine the basis for the jury's punitive damage award, which was submitted to the jury in the form of a general verdict, retrial of that issue is necessary as well. As the tortious interference verdict supports the actual damage award and is not barred by *Dittmer*, we affirm the actual damage award.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civil No. 86-2120

ROBERTSON OIL COMPANY, INC.
PLAINTIFF

v.

PHILLIPS PETROLEUM COMPANY
DEFENDANT

WESTERN DIST. ARKANSAS

FILED

NOV. 5, 1991

CHRIS R. JOHNSON, Clerk

MEMORANDUM OPINION

This case is before the court for the third time. Plaintiff's complaint, filed in 1986, asserted numerous causes of action against Phillips Petroleum Company, and, in 1987, a jury awarded plaintiff $750,000 in actual damages and $5,000,000 in punitive damages. The court then entered judgment on the verdicts. In 1989, the Eighth Circuit Court of Appeals affirmed the judgment with respect to the compensatory award, but reversed the punitive award and remanded for a new trial on plaintiff's claims for negligence and fraud and on the prayer for punitive damages. *See Robertson Oil Company, Inc. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989).

The following year, on retrial, a jury found for plaintiff on his claim for fraud and assessed punitive damages

against Phillips in the amount of $4,000,000 on plaintiff's claim for intentional interference with contract and $4,000,000 on plaintiff's claim for fraud. On appeal, the Eighth Circuit affirmed this court in all aspects of the trial proceedings, but remanded the case for the limited purpose of reviewing the punitive damage verdicts in light of the Supreme Court's ruling in *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (*Haslip*). *See Robertson Oil Company, Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991) (*Robertson II*). The Eighth Circuit ordered the court to "articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip* . . . as well as principles enumerated in the Arkansas cases." *Robertson II*, 930 F.2d at 1347.

I.

Under the law of the state of Arkansas, a trial court should allow an award of punitive damages to stand unless its amount " 'shocks the conscience of the court or demonstrates that jurors were motivated by passion or prejudice.' " *O'Neal Ford, Inc. v. Davie*, 299 Ark. 45, 49, 770 S.W.2d 656, 659 (1989), quoting from *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 423, 643 S.W.2d 526, 534 (1982). The first question that the court must address is whether these review criteria can pass muster under the reasoning in *Haslip*. It needs emphasizing that *Haslip* did not hold that the procedures that it approved, devices that the Alabama courts had developed over the years, are the minimum ones that the due process clause requires. Rather, the Court was careful to say simply that the Alabama procedure is constitutional because it "ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Haslip*, ___U.S. at ___, 111 S. Ct. at 1044.

In a case similar to the instant one, the Eighth Circuit expressed some reservations about the constitutionality of

the Arkansas post-verdict review processes, *see Union National Bank of Little Rock v. Mosbacher,* 933 F.2d 1440 (8th Cir. 1991), because the Arkansas Supreme Court has asserted that " '[c]onsiderable discretion is given to the jury in fixing punitive damages in an amount it deems appropriate to the circumstances.' " *Id.* at 1448, quoting from *Walt Bennett Ford v. Keck,* 298 Ark. 424, 429, 768 S.W.2d 28, 31 (1989). This court believes, however, that the Arkansas shock-the-conscience standard is not nearly so vague, elastic, and subjectively visceral as it might at first appear.

In the first place, this very standard has been employed by courts for as long as we have been a country, for it appeared in early equity cases where the chancellor was asked to set aside a bargain on the ground that consideration was grossly inadequate. *See, e.g., Underhill v. Howood,* 10 Ves. Jun. 209, 32 Eng. Rep. 824 (1804), and *Coles v. Trecothick,* 9 Ves. Jun. 233, 32 Eng. Rep. 592 (1804), both cited and followed in *Eyre v. Potter,* 56 U.S. (15 How.) 42, 59-60, 14 L. Ed. 592 (1853). The same collection of words has since done reputable duty in a wide variety of contexts, serving, for instance, to evaluate the constitutionality of pumping a suspect's stomach to obtain swallowed drugs, *see Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), or, generally, as a measure of what the fifth and fourteenth amendments to the Constitution require. *See, e.g., Moran v. Burbine,* 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); *Whitley v. Albers,* 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986) (cruel and unusual punishment); and *Breithaupt v. Abram,* 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957) (blood tests). The shock-the-conscience criterion has even been employed in considering whether the contract clause of the Constitution has been violated. *See Gelfert v. National City Bank,* 313 U.S. 221, 61 S. Ct. 898, 85 L. Ed. 1299 (1941), and *Home Building and Loan Asso-*

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ciation v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934).

The long and distinguished history of the Arkansas standard bears testimony to its utility and unconstitutionality. It is important, too, that that standard evidently has its genesis in a context in which the asserted unfairness of an act was resolved with reference to a relatively quantitative question, namely, whether an amount of money was grossly in excess of some other sum that could be determined with relative certainty. While the abstractly correct amount of punitive damages in any situation cannot be ascertained with a mathematical precision, the Arkansas standard is not nearly so subjective as defendants urge.

Secondly, an examination of the Arkansas cases reveals that the Arkansas Supreme Court has given its standard a rather definite shape and texture, for it has engaged in a number of rather specific inquiries under the aegis of its general standard. For example, the court has examined the relationship between the relevant parties, the ratio of the punitive award to the compensatory award, the extent and duration of a defendant's acts, the deliberateness of the defendant's acts in the face of no justification for them, the defendant's motives, the defendant's remorse, if any, the defendant's net worth, and other matters, in order to judge the propriety of a punitive award. *See Walt Bennett Ford, Inc. v. Keck,* 298 Ark. 424, 768 S.W.2d 28 (1989); *First Commercial Bank v. Kremer,* 292 Ark. 82, 728 S.W.2d 172 (1987); *Twin City Bank v. Isaacs,* 283 Ark. 127, 672 S.W.2d 651 (1984); *Pursley v. Price,* 283 Ark. 33, 670 S.W.2d 448 (1984); *Matthews v. Rodgers,* 279 Ark. 328, 651 S.W.2d 453 (1983); *Ray Dodge, Inc. v. Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972); *Holmes v. Hollingsworth,* 234 Ark. 347, 342 S.W.2d 96 (1961); *Vogler v. O'Neal,* 226 Ark. 1007, 295 S.W.2d 629 (1956); *McGlone v. Stokes,* 193 Ark. 1008, 104 S.W.2d 191 (1937); *St. Louis Southwestern Railway Co. v. Hagler,* 160 Ark. 543, 254 S.W. 1071 (1923); *Gordon v. McLearn,* 123 Ark. 496, 185

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S.W. 803 (1916); and *Pine Bluff and Arkansas River Railway Co. v. Washington,* 116 Ark. 179, 172 S.W. 872 (1915). Under these circumstances, a party that argues that the Arkansas procedure, as actually practiced, lacks a discernible perimeter or possesses insufficient form to pass constitutional muster has a difficult burden to carry. The court is clear that the review procedure "ensures meaningful and adequate review by the trial court," *Haslip,* ___ U.S. ___, 111 S. Ct. at 1044, and thus satisfies the due process clause.

Finally, it needs to be said that despite the moral skepticism of our age, its fascination with utilitarianism, and its tendency to apotheosize the work of the counting sciences, judging still requires judgment. Using judgment is not, as Holmes remarked in another context, a duty; it is merely a necessity. That there is some risk inherent in the enterprise does not distinguish it from any other human undertaking and cannot excuse a refusal to engage in it.

II.

The court turns now to an application of the criteria developed by the Arkansas Supreme Court. In our case, not merely one jury but two, each composed of twelve people, have unanimously concluded that it was appropriate to award punitive damages in relatively similar amounts against the defendant, a circumstance that itself must naturally produce reluctance on the part of the court to disturb the relevant findings. The juries, on sufficient proof, have found that Phillips committed two intentional torts against the defendant, one of them fraud. The court held that a finding of fraud would, without more, support an award of punitive damages; and in any case, both torts were intentional, a fact that in and of itself, under relevant Arkansas rulings, cuts against Phillips's contentions. Then, too, the ratio of punitive damages to compensatory damages, about ten to one, does not by itself suggest exces-

siveness, especially in light of Phillip's huge net worth of $2,000,000,000. *See* especially *Matthews,* 279 Ark. at 336-37, 651 S.W.2d at 458.

A few words about the relevance of net worth in these kinds of cases seem appropriate here. It is true, as this court has noted in other cases, that reference to net worth in determining the propriety of a penalty has been criticized as a denial of the equal protection of the law. Indeed, as an original proposition, it is fairly arguable that taking net worth into account when assessing a fine is a violation of the judicial oath to do equal justice to rich and poor. It has also been urged, on a somewhat more scientific plane, that it is not demonstrable that a marginal dollar is worth less to a billionaire than it is to a pauper, that, in other words, despite the diminishing marginal utility of money (or anything else) to everyone, there is no reliable method of making interpersonal utility comparisons. *See* R. Posner, *Economic Analysis of Law* 344-46 (2d ed. 1977). But we are, in our juridical history, now well past the point of relying on these arguments for excluding evidence of net worth, for they have been universally rejected, due partly to their counter-intuitive character.

It is not, however, in the court's view, improper for a defendant to make these arguments to a jury or to frame questions based on them for a plaintiff's expert. In other words, a defendant may urge these logical and moral propositions on the fact finder in an attempt to reduce the weight that the fact finder may give to the defendant's net worth. In fact, in this very case defendant's able counsel argued that net worth was not a datum upon which one could equitably base a punitive damage award, by effectively putting the case of an overparked vehicle that might, if that criterion were applied, draw a fine to Phillips of a million dollars or more. The court itself, moreover, on cross-examination of defendant's expert economist, elicited from him an admission that interpersonal utility comparisons are impossible to draw accurately.

Nor can the court reasonably conclude that the amount of the award evidences passion or prejudice on the part of the jurors. The court knows full well that oil companies may be the object of irrational envy and class bias. But, in the first place, the court did not even allow evidence of net worth into evidence until the jury had made a finding of liability and fixed a compensatory amount. This is a procedure that the court uses invariably in an attempt to reduce the effects, if any, of anti-capital prejudice. Secondly, plaintiff's counsel never once resorted to populist rhetoric and, though he was certainly a vigorous and effective advocate, at all times comported himself in a polite and appropriate manner. Nor did the court observe any overt manifestations of anger or irrationality in the behavior of the jury. In the circumstances, the court would have to resort to raw speculation to overturn or reduce the relevant awards on the basis that they were animated by passion or prejudice. That, of course, the court refuses to do.

Finally, it is noteworthy that while plaintiff's case was not remarkably obvious—indeed it seemed to the court rather thin in some respects—defendant's principal witnesses were nervous and uncertain in the extreme, so much so that a reasonable fact finder could have thought them deliberately evasive and could have concluded that they had guilty minds. The court is far from saying, of course, that such a conclusion was required, but plaintiff's case was well past the line that distinguishes the submissible case from the unsubmissible one.

III.

The court's attention has been called to the holding in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-79, 109 S. Ct. 2909, 2922, 106 L. Ed. 2d 219 (1989), which seems to indicate that a district court sitting in diversity should apply federal law in reviewing a jury's verdict. *But see id.*, 492 U.S. at 280, 109 S. Ct.

at 2923 (district court "applied the proper state-law standard in considering whether the verdict returned was excessive"). The application of Fed. R. Civ. P. 59(a) to this case, however, would not produce a different result, since federal courts, like the Supreme Court of Arkansas, ask whether "the proceedings have been tainted by appeals to prejudice" or whether the verdict " 'shocks the conscience of the court.' " *See* 11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2807 at 51-52 (1973). The court's analysis, therefore, would be the same regardless of whether it employed state or federal law.

IV.

For the reasons adumbrated, the court declines to vacate the judgments.

5 Nov., 1991 /s/ Morris S. Arnold
Date HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 91-3717

Robertson Oil Company, Inc.

Appellee,

v.

Phillips Petroleum Company,

Appellant.

Filed: February 18, 1994

Appeal from the United States District Court for the Western District of Arkansas

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Before MCMILLIAN, Circuit Judge, HEANEY and JOHN R. GIBSON, Senior Circuit Judges, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN and HANSEN, Circuit Judges, En Banc.

ORDER

The motion for stay of issuance of mandate pending the filing of a petition for certiorari is granted. Issuance of the mandate shall be stayed until the time expires for the filing of a petition for writ of certiorari. If no such petition is filed, the stay will terminate. If such petition be filed, then the stay will remain in effect until such time as the United States Supreme Court rules on the petition. If the petition for writ of certiorari is denied, the stay will terminate. If the petition is granted, the stay shall continue until such time as the United States Supreme Court issues its mandate.

BEST AV

Judges McMillian, Heaney, John R. Gibson and Hansen would deny the stay.

A true copy.

Attest: /s/ Michael E. Gans

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No. 93-1533

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PHILLIPS PETROLEUM COMPANY,
PETITIONER,
v.

ROBERTSON OIL COMPANY,
RESPONDENT.

Response to Petition For Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF FOR RESPONDENT ROBERTSON OIL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Julius Glickman*
Dennis G. Herlong
Glickman & Barnett, L.L.P.
1460 First City Tower
1001 Fannin
Houston, Texas 77002

James W. Jeans, Sr.
UMKC Law School
5100 Rockhill Road
Kansas City, MO 64110

Attorneys for Respondents
*Counsel of Record

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-9001

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QUESTIONS PRESENTED:

1. Whether the Eighth Circuit Court of Appeals abused its discretion in declining to exercise its power to set aside the law of the case where no clear error or manifest injustice was shown and where Robertson would be seriously prejudiced.

2. Whether the multiple historical standards developed under the Arkansas "shock the conscience" criteria along with other specific restraints applied in this case are sufficient under ***Haslip***.

3. Whether two separate punitive damage awards for two separate wrongful courses of conduct are proper when the evidence supports each separate award and petitioner at the first appeal attacked one award and won separate jury questions and a new trial because of separate conduct.

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No. 93-1533

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PHILLIPS PETROLEUM COMPANY,
Petitioner,
v.

ROBERTSON OIL COMPANY,
Respondent.

Response to Petition For Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF FOR RESPONDENT ROBERTSON OIL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To convince this Court to grant certiorari, Phillips has mischaracterized the record and omitted pertinent facts without which this case cannot be understood. The Eighth Circuit *en banc* did not say it lacked the power to overturn the law of the case; it said that it should not. That decision was discretionary and correct; it presents no conflict with any other circuit.

Phillips attempts to reduce the Arkansas standard of review to a simple phrase but never mentions that the Arkansas "shock the conscience" standard has been spelled out with specific and definite standards sufficient under ***Haslip***. Phillips never discloses these standards or discusses

the thorough post-verdict review and other constraints in this case that satisfy due process.

The procedural history of this case and the evidence supporting each award of punitive damages belie petitioner's claim of dual punishment. The reason that the trial court submitted two punitive damage issues to the jury at the second trial is because Phillips complained of one punitive damage issue at the first trial. Phillips persuaded the Eighth Circuit in ***Robertson I*** that each tort was supported by separate conduct and one punitive damage issue did not properly apportion punitive damages. Phillips got the due process it wanted but not the result.

Additional Constitutional Provision Involved

"...[N]o fact tried by jury shall be otherwise reexamined in any court of the United States, according to the common law." U. S. Const. amend. VII.

I.

STATEMENT OF THE CASE

Petitioner's statement of the case is not acceptable. Petitioner's specially selected excerpts from the opinions and factual record suggest conclusions that are unwarranted. Robertson now supplies omitted facts and essential holdings of the Court.[1]

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[1] For convenience, "Pet." refers to Petitioner's appendix. ***Robertson I*** refers to the panel decision on March 31, 1989. (Pet. 97a-115a.) ***Robertson II*** refers to the panel decision of April 18, 1991. (Pet. 87a-96a.) ***Robertson III*** refers to the panel decision of November 18, 1992. (Pet. 58a-86a.) ***Robertson en banc*** or ***en banc*** decision refers to the Eighth Circuit ***en banc*** opinion decided on December 28, 1993. (Pet. 1a-

What Phillips Did to Robertson

The facts of this case were set forth fairly in ***Robertson I***. (Pet. 97a-102a.) The story of Robertson is the story of a small businessman destroyed by Phillips. Robertson was a distributor or jobber of petroleum products in Arkansas. For seven years, Robertson had sold gasoline to twenty-three Spe-Dee Mart outlets. Phillips caused Robertson to lose Spe-Dee Mart, the customer that accounted for over sixty-five percent (65%) of Robertson's business. Spe-Dee Mart had sold gasoline under its own logo but to stay competitive, Spe-Dee Mart decided to brand. Brand means to display the Phillips or another company's trademark and logo. Spe-Dee Mart asked Robertson to convert its stores from unbranded to branded Phillips outlets. Phillips fraudulently represented to Robertson for five months that it would brand Spe-Dee Mart stores with the Phillips' logo. Phillips only told Robertson the truth when it was too late for Robertson to immediately provide another branded supplier to Spe-Dee Mart. Then, at a later meeting with Robertson and Spe-Dee Mart, Phillips made it clear to Spe-Dee Mart that they did not want Spe-Dee Mart's business and that Robertson was not someone in whom they had confidence.[2] After the meeting, Phillips behind Robertson's back sought Spe-Dee Mart's business directly and through a competing distributor of Robertson's. (Pet. 100a.) Spe-Dee Mart left Robertson and branded with Unocal. What had taken Robertson a lifetime to build was gone.

56a.) ***Haslip*** refers to ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1 (1991). ***TXO*** refers to ***TXO Prod. Corp. v. Alliance Resources Corp.***, 113 S. Ct. 2711 (1993).

[2] Contrary to Phillips' assertion, Spe-Dee Mart would have continued to do business with Robertson but for Phillips' conduct (Trial II Tr., Vol. 2 at 212-213).

The First Trial

Robertson sued in 1986 and the first trial occurred in October, 1987. The first jury found actual damages of $750,000 and assessed punitive damages at $5 million. Phillips' appeal became ***Robertson I***.

Robertson I - The Genesis Of Two Punitive Damage Awards

In ***Robertson I***, the Eighth Circuit upheld the tortious interference jury finding and actual damages of $750,000. The court said that the district court had correctly stated that all liability theories rested on only one basis for actual damages, the loss of the Spe-Dee Mart account. Then, at Phillips' urging, the Eighth Circuit recognized that a different analysis applied to punitive damages. It found that the conduct of tortious interference, fraud, and good faith and fair dealing were all intentional torts, but that "*each* (emphasis added) involved different conduct." (Pet. 114a.) The court expressly held that "*each* of these theories [fraud, tortious interference, good faith and fair dealing] therefore would support a different amount of punitive damages, depending on the conduct involved." (Pet. 114a.) Phillips never confesses that it originated this argument. (Pet. 21a.) At Phillips' urging, the Court took away $5 million awarded *in toto* as punitive damages and reversed because there was separate conduct for each tort. The court denied both sides' suggestion for rehearing *en banc*. Petitioner did not apply for writ of certiorari. The universe of issues to be resolved at a second trial was reduced to two: whether Phillips committed fraud and the penalties, if any, to be assessed for fraud and tortious interference. Dismayed, Robertson went back to the district court for yet a second trial held in 1990.

The unique circumstances under which both Robertson and Phillips engaged in a second trial make this case unusual and not likely to be repeated.

Phillips Gets a Second Chance With a Second Trial

The trial court held a second jury trial for Phillips. The second jury found fraud, malice and that an award of punitive damages for each of the two separate courses of conduct was justified. The jury found $4 million dollars in punitive damages for tortious interference and $4 million dollars in punitive damages for fraud. Phillips appealed for the second time.

The Appeal Of The Second Trial -- *Robertson II*

In ***Robertson II***, the court recognized that the jury had sufficient evidence that Phillips acted with malice in committing fraud. Phillips did not challenge the malice finding as to fraud. The court further found that the jury instructions were proper and that the jury had found all the elements necessary for punitive damages. (Pet. 92a.) Accordingly, the Eighth Circuit affirmed on all evidentiary and fact issues. (Pet. 96a.) The court held that the jury instructions were comparable to ***Haslip*** and satisfied due process. Indeed, the court held that Phillips also waived its objection to the instructions because it made no proper objection based on lack of standards. (Pet. 95a.) The Court said that, since there was no written opinion by the trial court, it was "unable to evaluate the adequacy of the district court's review of the award." (Pet. 96a.) In April 1991, the court then sent the case back to the district court to dispose of this one remaining issue and write an opinion regarding the propriety of the punitive damages award. Petitioner elected not to appeal after *en banc* consideration was denied. It had been over six and one-half years since Phillips put Robertson out of business.

Phillips Gets A Third Try - The Review By The Trial Court

For the third time, the parties appeared before the trial court who refused to set aside or reduce either award. The trial court wrote a thorough opinion and this review constituted an additional restraint on the jury. (Pet. 116a-123a.) Although ***Haslip*** was satisfied, Phillips was not.

Phillips Gets A Fourth Chance - *Robertson III* - The Last Remaining Issue

Phillips appealed for the third time. One question remained. Did the trial court, in reviewing the amount and propriety of punitive damages, meet the standards of the ***Haslip*** case? The court *en banc* held that it did.

Phillips even seeks to gain one vote on the *en banc* review. The vote was 7-3 with one justice joining the dissent only on the dual punishment issue.

II.

REASONS FOR DENYING THE WRIT

A proper identification of the issues demonstrates why this Court should deny certiorari. Petitioner seeks to transform well recognized rules of appellate procedure into non-existent circuit conflicts and asserts questions of due process already resolved in ***Haslip***. Phillips' points amount to no more than the routine application of principles of law. It does not invoke the "special and important" reasons set forth by the Court that would justify review of this case.

Petitioner presents Question 1 as an issue of whether a Federal Court of Appeals, sitting *en banc*, is bound by

previous interlocutory decisions. Nothing in the *en banc* decision even hints that the court was "bound" by the previous decisions. The court simply rejected the dissent's position that the "entire litigation be reopened for review." The majority voted that it "should not" do this, not that it "could not." (Pet. 4a n.5.)

The *en banc* decision does not conflict with other circuits regarding the power of the court *en banc* to review a panel decision. The principles for overturning the law of the case as applied in the Eighth Circuit was fully examined and "firmly endorsed" in ***Liberty Mut. Ins. Co. v. Elgin Warehouse and Equipment***, 4 F.3d 567, 573 (8th Cir. 1993). (Pet. 4a n.5.) The court's decision not to review panel decisions in the absence of a showing of clear error, manifest injustice, or prejudice to the other party is compatible, not conflicting, with the holdings in other circuits. 1B James W. Moore, et al., ***Moore's Federal Practice***, § 0.404 [4.-6] n.42 (2d ed. 1993) (outlining similar tests in each of the circuits). The decision by the *en banc* court not to reopen a decision made in this litigation over five years ago was discretionary. ***Arizona v. California***, 460 U.S. 605, 618 n.8 (1983). Petitioner advances no arguments to suggest that the exercise of that discretion was arbitrary or capricious. This Court should decline the invitation to micromanage the discretionary rulings of each of the circuits in applying their *en banc* rules.

Question 2 attempts to characterize the Arkansas standard of review as a simple "shock the conscience" test that violates due process. Petitioner has ignored the definitive, scholarly analysis of the constraining standards that have evolved under the "shock the conscience" standard of Arkansas law articulated by Judge Morris Arnold. (Pet. 116a-123a.) Petitioner fails to mention the *en banc's* affirmation of those standards and analysis under ***Haslip*** and

TXO. (Pet. 5a-15a.) These standards limit discretion and comply with ***Haslip*** and ***TXO***. Judge Arnold's review was itself a sufficient restraint under ***Haslip***. The Eighth Circuit's examination of the instructions, of the trial court's review and of the standards under Arkansas law constitute an additional constraint on unlimited discretion.

Question 3 contains Petitioner's complaint of two separate punitive damage awards for two separate wrongful courses of conduct. Petitioner seems to have a lapse of memory. In ***Robertson I***, it complained that the single punitive damage award the jury assessed was not specifically tied to any one or more of separate wrongful courses of conduct with which it was charged and each tort involved different conduct. Petitioner won its point in ***Robertson I***. On retrial, the trial court did as Petitioner requested and the jury was invited to consider the possibility of punitive damages for each of the two counts of fraud and intentional tortious interference, each of which Phillips had said was supported by separate conduct of Phillips. The jury obliged and awarded two separate amounts for two separate wrongful courses of conduct. Three quotations from Petitioner's reply brief of August 2, 1988 in ***Robertson I*** are worthy of attention here because, as the Eighth Circuit *en banc* noted, they conclusively discredit Phillips' disingenuous argument. (Pet. 21a, 22a.) These complete quotations can be found in the *en banc* opinion but we summarize them here. In 1988, Phillips said that the one punitive damage award was improper because it was "impossible to apportion the award among the various theories of liability . . . and, neither of the punitive damages interrogatories [one as to entitlement and one as to amount], are tied to specific torts." (Pet. 21a.) In 1988, Phillips also said the compensatory award had no bearing on punitive damages because punitive damages depend upon the conduct of the defendant, not upon the loss to the plaintiff. (Pet. 21a.) Still unmindful of what it argues

today, Phillips said then that were two different time frames for the torts of fraud and tortious interference. (Pet. 22a.)

The court *en banc* said, "Phillips got what it asked for." (Pet. 22a.) Basic fairness says Phillips should live with what it got, and the evidence requires it. Each of the jury findings of punitive damages on tortious interference and fraud is supported by evidence of separate conduct as the *en banc* court held. (Pet. 22a.) Phillips offers no proof to the contrary.

Not only is Petitioner's position troubling because it seeks to retain the benefits of its victory in ***Robertson I*** which directly conflict with its position here and ignores the evidence in support of each award, but Phillips' argument lacks merit for an entirely different reason. It waived any claim of dual punishment. It never objected to dual damage questions to the jury at the second trial. (Trial II Tr., Vol. 3 at 184, 189, 193-198.) Nor did Phillips ever claim, except before this Court, that ***Robertson I*** should be revisited. (Pet. 19a n.13.) Petitioner has not preserved its dual punishment claim.

Petitioner, for good reason, is never explicit about what it wants this Court to do if certiorari is granted. In overturning the law of the case, Petitioner would open up the entire litigation and begin anew. This would be unfair to Robertson. Robertson lost a $5 million punitive damage award because of Petitioner's first appeal. Petitioner accepted and enjoyed the benefit of wiping out a $5 million jury award and gained a second chance to eliminate or reduce all punitive damages. After ***Robertson I***, Robertson accepted $750,000 and Phillips accepted a release from Robertson on actual damages. (Supp. App. 1a) Is Robertson to give back that money? At a third trial, does Petitioner want one punitive damage issue which it attacked in

Robertson I or does it want two punitive damage issues which it attacks now? Petitioner has in this appeal directly contradicted the position that it took in the first appeal and asks Robertson to pay the price for Petitioner's success in ***Robertson I***. For Petitioner, it is "heads I win, tails you lose."

And to what end? Nothing important will be added to the law of the case doctrine among the circuits nor will the restraints imposed by ***Haslip*** be changed or clarified. While the outcome may be of vital importance to the parties, the distinctive nature of this case should have little precedential value beyond its facts. Other than the application of ***Haslip***, which itself presents nothing novel, Petitioner has raised only evidentiary and procedural questions which are not constitutional and which were correctly decided.

And what of the harm? Even though the alleged errors were different each time, both juries rendered substantially similar awards. Those two trials make it apparent that Phillips does not need another trial. It needs different facts. In context, Phillips' alleged errors are at best harmless.

During this eight year judicial saga, there have been six separate decisions rendered in this case. Two of those decisions have resolved the facts and assessed the penalty; four of those decisions resolved points of law and, with each resolution, the legal issues were reduced and finally eliminated. Phillips' remedy is to send Robertson into a vicious circle of litigation and disregard all that has happened before. This is neither good law nor wise policy.

The appellate process has served its purpose.

III.
THE EIGHTH CIRCUIT CORRECTLY DECLINED TO EXERCISE ITS POWER TO VACATE *ROBERTSON I* UNDER THESE UNIQUE FACTS AND THAT REFUSAL PRESENTS NO CONFLICT AMONG CIRCUITS. MOREOVER, PHILLIPS HAS WAIVED THIS POINT.

Petitioner claims that the Eighth Circuit held that it was "bound" by previous "interlocutory panel opinions" and that such constraint presents conflicts with the Second, Sixth, and Ninth Circuits. (Pet. i and 10.) Neither claim is accurate. The Eighth Circuit did not claim that it "could not" overturn the law of the case. It said that the court "should not" under the circumstances of this case. (Pet. 4a n.5.) The court was correct in refusing to set aside a case decided over five years ago, especially where Petitioner saved $5 million dollars and persuaded the court to adopt the very position that it now says should be set aside.

Phillips' inability to meet either the clear error or manifest injustice requirement is revealed in the doctrine of estoppel. The two punitive damages awards were precisely what Phillips asked for and used as a basis in ***Robertson I*** to reverse the trial court which submitted only one punitive damage question. This is not only law of the case but estoppel. (Pet. 22a, 77a.) This factor makes ***Robertson*** unique. Phillips has been content to let these findings by the court pass without response in its briefs. The cases and the facts further belie Petitioner's so-called conflicts.

The Eighth Circuit's view of the law of the case was expressed in ***Liberty Mut. Ins. Co. v. Elgin Warehouse and Equipment***, 4 F.3d 567, 573 (8th Cir. 1993) (holding that it would not disturb prior panel's decision unless intervening controlling authority reached contrary decision or unless

prior panel decision was clearly erroneous and would work a manifest injustice). Relied upon by ***Robertson en banc*** (Pet. 4a-5a n.5; 19a n.13), ***Liberty Mutual*** is consistent with the rule in all circuits and this Court. 1B James W. Moore et al., ***Moore's Federal Practice***, § 0.404 [4.-6] (2d ed. 1993); ***Arizona***, 460 U.S. at 618; ***Christianson v. Colt Industries Operating Corp.***, 486 U.S. 800, 817 (1988). The cases cited by Phillips from other circuits do not raise a conflict. The Second, Sixth, and Ninth Circuits apply essentially the same rule as every other circuit. ***In Re United States Steel Corp.***, 479 F.2d 489, 494 (6th Cir. 1973), ***cert. denied***, 414 U.S. 859 (1973); ***Kimball v. Callahan***, 590 F.2d 768, 771-772 (9th Cir.), ***cert. denied***, 444 U.S. 826 (1979); ***Van Gemert v. Boeing Co.***, 590 F.2d 433, 437 n.9 (2nd Cir. 1978) (***en banc***), ***aff'd***, 444 U.S. 472 (1980).

How each circuit applies clear error, manifest injustice, and prejudice to the parties depends on the facts of each case. Petitioner's cases are factually remote from Robertson. ***Shimman v. International Union of Operating Engineers Local 18***, 744 F.2d 1226 (6th Cir. 1984) (***en banc***), ***cert. denied***, 469 U.S. 1215 (1985) (an attorney who had prevailed at the trial was not entitled to attorney's fees for the first appeal). ***Watkins v. United States Army***, 875 F.2d 699 (9th Cir. 1989), ***cert. denied***, 498 U.S. 957 (1990) (the Army's denial of re-enlistment to an acknowledged homosexual contains no discussion of any of the factors present in ***Robertson***). ***Van Gemert***, 590 F.2d at 436-437 n.8. (***Van Gemert III*** "raises [a] wholly different question" regarding attorneys' fees than did ***Van Gemert II***.)

The Eighth Circuit never denied that it had the power to vacate ***Robertson I***; it simply said it declined in the instant case to exercise that power. Phillips' alleged conflicts are illusory.

Petitioner has not met any requirement to overturn the law of the case. Petitioner's own case points out that reversing the law of the case is improper where "a party would be seriously prejudiced as a result." ***Van Gemert***, 590 F.2d at 437 n.9. Petitioner accepted the benefits of a second trial and a second chance to defeat fraud and reduce or eliminate all punitive damages. Robertson has already been prejudiced by losing the first $5 million award because of one punitive damage interrogatory in ***Robertson I***. It would be additional jeopardy and basic unfairness for Robertson to lose two punitive damage awards because the court agreed with Petitioner's position that the two awards were proper. It would require a company financially ruined by Phillips to proceed to trial for a third time when two juries have spoken.

The underlying but unstated premise of Petitioner is that, in a third trial with different or more standards, a jury would award different amounts. What Petitioner cannot sweep away is its reprehensible conduct. Two juries have spoken on Petitioner's conduct; a learned trial judge has reviewed that conduct and the punitive damages three times. Different words or standards would not have changed the outcome and Petitioner does not argue otherwise. The balancing of interests under due process must also take into account the equity of Robertson and the Seventh Amendment to the United States Constitution which prohibits the reexamination of facts found by a jury. Not once does Petitioner mention the Seventh Amendment.

Petitioner has not made any showing of manifest injustice or that ***Robertson I*** was clearly wrong or "dead wrong." ***City Public Service Bd. v. General Electric Co.***, 935 F.2d 78, 82 (5th Cir. 1991). The Eighth Circuit in ***Robertson I*** made a reasoned decision to remand the punitive damage issues for a new trial which in no way conflicted with ***Gasoline Products Co. v. Champlin Refining Co.***, 283

U.S. 494 (1931) (holding that where jury in breach of contract case did not determine the date of the contract formation, its time for performance, or date of its breach, the jury could not determine actual damages under the contract without retrying liability). In ***Robertson***, the actual damages were determined by the jury. The Eighth Circuit in ***Robertson I*** instructed that at retrial, the determination of the punitive damage award would involve full development of Petitioner's conduct which in fact took place. Consequently, the jury was not impaired in its consideration of whether or not to award punitive damages. Other similar cases have so held. ***Litman v. Massachusetts Mut. Life Ins. Co.***, 825 F.2d 1506 (11th Cir. 1987), ***cert. denied***, 484 U.S. 1006 (1988) (affirmed punitive damages after remand solely on issue of punitive damages); ***Terrell v. Household Goods Carriers' Bureau***, 452 F.2d 152 (5th Cir. 1971) (***en banc***) (affirming liability but reversing for a new trial on damages); ***Terrell v. Household Goods Carriers' Bureau***, 494 F.2d 16 (5th Cir.), ***cert. dismissed***, 419 U.S. 987 (1974) (affirming damages). Since all of the facts were considered at the second trial, the jury could properly assess punitive damages, if any, and meet the requirements of ***Gasoline Products***. ***Robertson I*** was not wrong much less clearly wrong.

Petitioner invites this Court to micromanage matters more properly the concern of each circuit. The decision even to grant the *en banc* review is itself a matter for each circuit to determine. After receiving this rare *en banc* review, Petitioner goes one step further and says that the Eighth Circuit was bound to reverse ***Robertson I***. Whether the Eighth Circuit should vacate one of its prior panel decisions does not affect any other circuit. Normally, intracircuit conflicts are not a sufficient basis of review. ***See Davis v. United States***, 417 U.S. 333, 340 (1974). It should make no difference to the Fourth Circuit how the Eighth Circuit maintains uniformity in its circuit, how it exercises

its discretion to follow the law of the case, or how far it chooses to extend its *en banc* ruling to prior panel decisions. *See* Fed. R. App. P. 35A. There are many factors in determining whether the court should exercise its power to vacate prior decisions. One is whether it would encourage "repeated appeals by the obstinate defendants." ***Roberts v. Cooper***, 61 U.S. 467, 481 (1858), quoted in ***White v. Murtha***, 377 F.2d 428, 431 (5th Cir.), ***adhered to on reh'g***, 381 F.2d 34 (5th Cir. 1967). Workload is also an important factor. ***Liberty Mut. Ins. v. Elgin Warehouse Equipment***, 4 F.3d at 573 (J. Gibson, dissenting).

Petitioner struggles mightily to avoid law of the case by repeated use of "interlocutory" to describe the prior decisions in this case. Decisions of a panel have never been called interlocutory. The inappropriate use of this term to describe ***Robertson I*** and ***II*** wrongly suggests that these decisions were merely passing episodes in a continuing, open-ended process of review awaiting final appraisal by a court sitting *en banc*. Judge Arnold and the parties were bound to follow ***Robertson I*** and ***II***. Both decisions were appealable. Petitioner's semantic creativity to suggest temporality cannot change finality.

Not only does Petitioner's argument fail on the merits, but it is procedurally defective as well. Prior to this writ, Phillips has never asked this Court to vacate ***Robertson I***. (Pet. 19a n.13.) Consequently, Phillips has failed to preserve this point. If Petitioner's claim that ***Robertson I*** was fundamental error and clearly erroneous, it was not recognized to be so by the Eighth Circuit in 1989 nor by Phillips since it never raised the point before any other court.

IV.

ARKANSAS LAW HAS DEFINED "SHOCK THE CONSCIENCE" WITH CONSTRAINING STANDARDS. THOSE STANDARDS, ALONG WITH THE JURY INSTRUCTIONS AND THE POST-VERDICT REVIEW BY THE TRIAL COURT AND APPELLATE COURT, FULFILL *HASLIP*.

Petitioner represents the "shock the conscience" standard as a barren phrase which Arkansas uses to judge punitive damage awards. Petitioner never discloses nor addresses the standards which have evolved and which are spelled out in Judge Arnold's post-verdict review in ***Robertson II*** and by the Arkansas Supreme Court cases of ***Ray Dodge, Inc. v. Moore***, 479 S.W.2d 518 (Ark. 1972) and ***Holmes v. Hollingworth***, 352 S.W.2d 96 (Ark. 1961).

Relying on ***Ray Dodge*** and ***Holmes***, ***Robertson II*** identified the following criteria in evaluating punitive damages:

1. punishment;
2. deterrence;
3. the nature, extent and enormity of the wrong;
4. the intent of the party committing it;
5. the financial and social condition and standing of the parties;
6. the amount of compensatory damages;
7. whether the award "shocked the conscience;"
8. whether the jury was motivated by passion or prejudice;
9. generally, all of the circumstances attending the particular transaction.

These Arkansas standards are limiting. ***Haslip*** condemned "unlimited jury discretion or unlimited judicial discretion . . . that may invite extreme results." 499 U.S. at 18.

Not only does Petitioner ignore these limiting standards, but Petitioner fails to address other factors which led this Court to conclude that due process was satisfied in ***Haslip***. These factors were also present in ***Robertson***: (1) the trial court's instructions provided "reasonable restraints" on jury discretion; (2) the court employed a post-trial review of the award (499 U.S. at 20); and (3) The appellate court reviewed the award of punitive damages under the standards imposed in Arkansas law.

In Robertson, the eloquent post-verdict review was extensive - far more extensive than was sustained in ***Haslip***. The choice of a jurist for such analysis could not have been more apt: the judge before whom both trials were conducted and a brilliant legal scholar well acquainted with Arkansas law. Judge Arnold pointed out that Arkansas has given the shock the conscience standard "a rather definite shape and texture" and has engaged "in a number of rather specific inquiries under the aegis of the general standard." (Pet. 119a.) Judge Arnold examined "the relationship between the relevant parties, the ratio of the punitive award to the compensatory award, the extent and duration of the defendant's acts, the deliberateness of the defendant's acts in the face of no justification for them, the defendant's motives, the defendant's remorse, if any, the defendant's net worth, and other matters in order to judge the propriety of a punitive award." (Pet. 119a.) The court then proceeded to analyze those various factors to see whether they comported with ***Haslip***. (Pet. 119a-122a.)

Judge Arnold noted how "nervous and uncertain in the extreme" defendant's witnesses were and stated that he could understand that a fact finder could have thought them "deliberatively evasive" with "guilty minds." (Pet. 122a.) To this, Phillips makes no reply.

The trial court felt it important that not one, but two juries, each composed of 12 people, had unanimously concluded that it was appropriate to award substantially similar punitive damages. (Pet. 120a.) Indeed, a verdict rendered by twelve citizens, in itself, is good indication of the extent to which the conduct offends a public sense of justice and propriety in particular. 499 U.S. at 40-41; (J. Kennedy concurring). Judge Arnold also regarded it as significant that Phillips committed two intentional torts. (Pet. 120a.) Intent is an important factor in Arkansas and ***Haslip***. (Pet. 94a); 499 U.S. at 21.

Judge Arnold found no passion or prejudice on the part of the jurors and gave specific reasons for his finding. Judge Arnold observed that plaintiff's counsel did not resort to populist rhetoric, but at all times conducted himself in a polite and appropriate manner. He saw no overt manifestations of anger or irrationality in the behavior of the jury. Under the circumstances, the Court concluded that it would require "raw speculation to overturn or reduce the relevant awards on the basis that they were animated by passion or prejudice." (Pet. 122a.)

Judge Arnold concluded that his analysis would be the same under federal or state law. (Pet. 122a - 123a.)

The instructions to the jury were further constraints. The ***Haslip*** instructions were approved because they enlightened the jury as to the nature and purpose of punitive damages, identified the damages as punishment for the kind

of wrongdoing involved, and explained that their imposition was not compulsory. 499 U.S. at 19. The ***Robertson*** instructions satisfy these criteria and placed additional constraints on the jury as demonstrated by the following comparisons:

The Nature of the Act Which Triggers Punitive Damages

Haslip	**Robertson**
Should you award punitive damages, in fixing the amount you must take into consideration *the character and the degree of the wrong, as shown by* the evidence *and necessity of preventing similar wrong*. (Emphasis added) ***Haslip***, at 6 n.1.	In order to recover punitive damages from Phillips "Robertson . . . had the burden of proving that Phillips *intentionally pursued a course of conduct for the purpose* of causing injury or damage." (Emphasis added) (Appellant's App. at 52, *Robertson*, (No. 90-1451)).

Thus, the jury in ***Haslip*** was only generally told to consider "the character and degree of the wrong" with no guidance as to how egregious the conduct was or even whether the defendant intentionally harmed the plaintiff. ***Robertson***, on the other hand, demanded that the jury find a specific malicious state of mind and that Phillips intentionally "pursued a course of conduct," not a single "wrong" as in ***Haslip***.

The Purpose of Imposing Punitive Damages

Haslip	Robertson
...the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering [sic] the defendant and others from doing such wrong in the future. ***Haslip*** at 6 n.1.	In addition to compensatory damages for the actual loss that Robertson sustained and has already recovered, it asks for punitive damages (which) may be imposed to punish a wrongdoer and to deter others from similar conduct. (Appellant's App. at 52, ***Robertson***, (No. 90-1451).)

Although both instructions refer to deterrence and retribution, the factors Justice Blackmun found sufficiently limiting in ***Haslip***, 499 U.S. at 19, the ***Robertson*** instruction imposed more control and suggested a more modest recovery. The jury was told that Robertson had already recovered his actual loss and was seeking an *additional* recovery against defendant *only* "to punish" "and to deter *others*" (not to punish and deter "defendant and others").

The Jury's Discretion in Imposing Punitive Damages

Haslip	Robertson
Imposition of punitive damages is *entirely discretionary* with the jury, that means you don't have to award it *unless this jury*	You are not required to assess punitive damages against Phillips on either the allegations of fraud or that of intentional interference

feels that you should do so. (Emphasis added) ***Haslip*** at 6 n.1.

with contract, but you may do so *if justified by the evidence*. (Emphasis added) (Appellant's App. at 52, ***Robertson***, (No. 90-1451)).

Both instructions made it clear that the imposition is not required, but there the similarity ends. The ***Haslip*** jurors were instructed that the awarding of punitive damages is "*entirely* discretionary" depending on how "this jury *feels*." The Arkansas instruction was more restrictive and less inviting which stated that the jury "*may*" award punitive damages but only "*if justified by the evidence.*" Judge Arnold also told the jury on three separate occasions that it could award no punitive damages.

The jury was also asked in separate interrogatories whether punitive damages were justified at all with respect to the fraud count and tortious interference count. (***Robertson II*** Supp. App. at 12-13). Each question provided an independent check as to each cause of action on jury discretion not present in ***Haslip***.

Finally, Petitioner received one substantial additional due process protection only rarely given to any party - *en banc* review.

V.

THE TWO PUNITIVE DAMAGE AWARDS WERE NOT DUPLICATIVE BUT WERE APPORTIONED TO SEPARATE CONDUCT AS PETITIONER REQUESTED. EACH AWARD IS SUPPORTED BY THE EVIDENCE, THE JURY INSTRUCTIONS, THE LAW OF THE CASE, AND ESTOPPEL.

In essence, the issue of two awards is evidentiary and procedural but not constitutional. The jury at the second trial divided punitive damages according to Phillips' separate conduct of tortious interference and fraud. Phillips asked for this in ***Robertson I***. There, Phillips argued - successfully - that one punitive damage issue of $5 million was improper and should be reversed because the tort theories each involved separate factual foundations and it was not possible to attribute the punitive damages to the separate conduct of each theory. (Pet. 21a - 22a.) The ***Robertson I*** court agreed and reversed. Thus, two damage awards became the law of the case in ***Robertson I***. That decision became the basis for the second trial about which Petitioner now complains. (Pet. 19a.) The Eighth Circuit said that Phillips got what it asked for in ***Robertson I*** and is bound by what it received. (Pet. 22a, 77a.) Giving Phillips its way ought to satisfy, axiomatically, every test of due process.

In addition to Phillips' own advocacy, the evidence supports each award. The fraud and tortious interference were based on different conduct. The tortious interference occurred in a meeting in October, 1984 with Robertson's biggest customer. Petitioner insulted Robertson's largest customer and disparaged the performance of Robertson. (Pet. 22a, 100a.) The conduct for fraud occurred earlier - from May to October, 1984 before the tortious interference meeting. Phillips admitted this in ***Robertson I*** when it

argued in its reply brief that these were the two different time frames of the conduct that might support punitive damages. *See* Phillips' reply brief quoted in the *en banc* opinion. (Pet. 22a.) After the court adopted Phillips' position, Robertson was forced to try the case again based on Phillips' theory. Phillips got a second chance to zero Robertson on punitive damages.

When a litigant changes its position, and persuades the court to adopt its position, it is estopped. This plays "fast and loose with the court" and undermines the integrity of the judicial process. ***Allen v. Zurich Ins. Co.***, 667 F.2d 1162, 1166-8 (4th Cir. 1982); ***Morris v. California***, 966 F.2d 448, 453 (9th Cir.) ***cert. denied***, 113 S. Ct. 96 (1992). Phillips was estopped from claiming a position in conflict with what it successfully asserted at an earlier stage of this litigation. (Pet. 22a, 77a n.11.)

Phillips also claims now that, since there was a single injury and compensatory award to Robertson, there cannot be two punitive damage awards. Phillips said precisely the opposite in ***Robertson I***. (Pet. 21a.) There, Phillips agreed with the *en banc* opinion that punitive damages are not intended to compensate the victim. That is the function of actual damages. Punitive damages focus on the punishment and deterrence of the defendant, not on harm to the plaintiff. (Pet. 21a.)

Phillips has not been punished twice for the same conduct. The jury found separate punitive damages for tortious interference and separate punitive damages for fraud. The jury was instructed to assess damages for <u>each</u> cause of action and that it could find zero punitive damages for either or both causes of action. The jury was properly instructed on the separate elements of each cause of action. (Pet. 20a, 24a, and 96a.) The Eighth Circuit found that each element

of fraud and each element of tortious interference was supported by sufficient evidence. (Pet. 88a, 96a, 105a - 106a, and 114a.) Robertson was entitled to recover punitive damages for each cause of action because they related to two separate sets of conduct. If, as Phillips suggested in ***Robertson I***, we focus on the function of punishment and deterrence, the conduct to evaluate punitive damages is different from the actual damages. The nature, extent, and enormity of each of the wrongs, the intent of the party committing each of the wrongs, and the general circumstances attending each particular transaction involved differ with respect to each of the two punitive awards. (Pet. 20a.) Even now Phillips does not challenge that evidence. While Phillips labels this question one of due process, it is really evidentiary. The evidence supports each award.

As one would expect, Petitioner never objected to two punitive damage questions at the second trial since two awards were what it had requested at the first appeal. (Trial II Tr., Vol. 3 at 184, 189, 193-198). This is waived. Fed. R. Civ. P. 51.

Conclusion

During the eight years of this judicial journey, Phillips has had more due process than most litigants ever receive. Phillips has yet to accept responsibility for its own acts. Instead, it has blamed two juries, the trial judge, four appellate panels, and an imagined lack of standards. Under the circumstances, Petitioner's feigned loss of due process is purely hypothetical. Petitioner's concern is not about due process, but special process for itself to escape the consequences of its conduct. We respectfully suggest that fundamental fairness calls for this matter to end by this Court denying certiorari.

Respectfully Submitted

Julius Glickman*
Dennis G. Herlong
GLICKMAN & BARNETT, L.L.P.
1460 First City Tower
1001 Fannin
Houston, Texas 77002

James W. Jeans, Sr.
UMKC Law School
5100 Rockhill Road
Kansas City, MO 64110

Attorneys for Respondents
*Counsel of Record

SUPPLEMENTAL

APPENDIX

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES
DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ROBERTSON OIL COMPANY PLAINTIFF

vs. No. 86-2120

PHILLIPS PETROLEUM COMPANY DEFENDANT

ORDER SATISFYING JUDGMENT AND DISCHARGING SURETY ON SUPERSEDEAS BOND

Now on this 10 day of August, 1989, upon the joint motion of the Plaintiff and the Defendant, the portion of the money Judgment for compensatory damages entered herein on October 22, 1987, which was affirmed by the Opinion and Order of the United States Court of Appeals for the Eighth Circuit filed March 31, 1989, be and the same are hereby satisfied in full, and the Defendant and Safeco Insurance Company of America be and the same are hereby released and discharged as principal and surety on the supersedeas bond filed herein on February 18, 1988.

/S/ Morris S. Arnold
UNITED STATES DISTRICT JUDGE

U.S. District
Western Dist. Arkansas
F I L E D
AUG 10 1989
CHRIS R. JOHNSON, CLERK
BY
Deputy

APPROVED:

Mr. William P. Thompson
THOMPSON, PADDOCK & LLEWELLYN
P.O. Box 818
Fort Smith, AR 72902

Mr. Julius Glickman
GLICKMAN & BARNETT
1460 First City Tower
1001 Fannin
Houston, TX 77022

By /s/ Julius Glickman
Attorneys for Plaintiff

NEAL F. LEHMAN
Attorney
Phillips Petroleum Company
Bartlesville, OK 74004
918-661-5650

Robert L. Jones, Jr.
JONES, GILBREATH, JACKSON & MOLL
P. O. Box 2023
Fort Smith, AR 72902-2023
501-782-7203

By /s/ Robert Jones, Jr.
Attorneys for Defendant

(3)

Supreme Court, U.S.
FILED
MAY 4 1994
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No. 93-1533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

ROBERTSON OIL COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY MEMORANDUM

ROBERT L. JONES, JR.
JONES, GILBREATH, JACKSON & MOLL
P.O. Box 2023
Fort Smith, AR 72902
(501) 782-7203

WILLIAM H. SUTTON
KEVIN A. CRASS
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Bldg.
400 West Capitol Avenue
Little Rock, AR 72201-3493
(501) 376-2011

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

WILLIAM G. PAUL
NEAL F. LEHMAN
PHILLIPS PETROLEUM COMPANY
1136 Adams Building
Bartlesville, OK 74004
(918) 661-5650

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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REPLY MEMORANDUM

This memorandum responds to the brief in opposition to certiorari of respondent Robertson Oil Company.

1. Question 1—Applicability of the Law of the Case Doctrine During *En Banc* Review.

Robertson has chosen to mischaracterize and dodge the essence of Question 1. It argues that the Eighth Circuit simply chose not to revisit errors committed by prior interlocutory[1] panel decisions because Phillips failed to meet the requirements of the law of the case doctrine by showing that the incorrect rulings constituted "clear error or manifest injustice." *See* Opp. at 7, 11, 13. But the question presented here is whether the law of the case doctrine applies *at all* when a court of appeals grants *en banc* review. The Eighth Circuit explicitly answered this question in the affirmative. *See* Pet. App. 4a & n.5; *id.* 19a & n.13. As three dissenting judges expressly recognized, *id.* 29a, this holding directly conflicts with the *en banc* decisions of the Second, Sixth and Ninth Circuits, which have held that the law of the case doctrine is wholly inapplicable in the context of *en banc* review. *Van Gemert* v. *Boeing Co.*, 590 F.2d 433, 437 n.9 (2d Cir. 1978), *aff'd.*, 444 U.S. 472 (1980); *Watkins* v. *United States Army*, 875

[1] Robertson charges Phillips with "semantic creativity" for referring to the first two panel decisions as "interlocutory." Opp. at 15. However, both of the challenged decisions remanded the case for further proceedings in the district court, neither decision was final, and both were by definition, interlocutory. *See, e.g., Virginia Military Institute* v. *United States*, 113 S. Ct. 2431 (1993) (opinion of Scalia, J., respecting denial of certiorari) (where Fourth Circuit had remanded case for "determination of an appropriate remedy" judgment was not final); *see generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18 at 195-98 (7th ed. 1993).

F.2d 699, 704 n.8 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990); *Shimman* v. *International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985). None of these other decisions applied the clear error or manifest injustice standards of the law of the case doctrine, and all three overturned prior interlocutory panel decisions in circumstances indistinguishable from those presented here. *See* Pet. at 11-12.

Robertson argues that "[t]he cases cited by Phillips from other circuits do not raise a conflict" because the "Second, Sixth, and Ninth Circuits apply essentially the same [law of the case] rule as every other circuit." Opp. at 12, 13. But Robertson supports this incorrect statement by citing two *panel* decisions that did nothing more than apply ordinary law of the case principles with respect to other panel rulings.[2] Robertson also relies, inexplicably, on the Second Circuit's decision in *Van Gemert*, which unequivocally rejects the argument that "the court sitting *en banc* . . . [should] consider itself bound by the law of the case established by a panel in an earlier appeal." 590 F.2d at 437 n.9.[3]

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[2] *Kimball* v. *Callahan*, 590 F.2d 768, 771 (9th Cir.) ("one *panel* of an appellate court will not as a general rule reconsider questions which *another panel* has decided on a prior appeal in the same case") (emphasis added), *cert. denied*, 444 U.S. 826 (1979); *In re United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973). Throughout its opposition, Robertson cites panel decisions that have nothing to do with the question whether *en banc* review is constrained by the law of the case doctrine. *See, e.g., City Public Service Bd.* v. *General Electric Co.*, 935 F.2d 78, 82 (5th Cir. 1991).

[3] Robertson's assertion that *Van Gemert* actually "applies" (Opp. at 12, 13) the law of the case doctrine is, in a word, false. *Van Gemert* is the seminal decision holding that the law of the case doctrine does not apply during *en banc* review, and was cited for that very proposition by the Sixth Circuit in *Shimman*, 744 F.2d at 1229 n.3, the Ninth Circuit in *Watkins*, 875 F.2d at 704 n.8, and the dissent below. Pet. App. 29a.

Robertson is equally wrong in relying on *Moore's Federal Practice* to support its argument that the decision below is "consistent with the rule in all circuits and this Court." Opp. at 12. That treatise asserts the opposite: "The decision of a panel is *not* the law of the case in an appeal decided by the court in banc. This being so, even if the panel on a second appeal may not correct an earlier error by another panel, it can be corrected by rehearing in banc." *See* 1B J. Moore, *Moore's Federal Practice* ¶ 0.404 [4.-5] at II-25 n.12 (2d ed. 1993) (emphasis added).

Robertson also apparently assumes that *this* Court is bound by the law of the case as established by the first two panel decisions and that Phillips is asking this Court to address the merits of the partial remand question during plenary review. *See, e.g.*, Opp. at 15 ("Both decisions were appealable . . . . Prior to this writ, Phillips has never asked this Court to vacate *Robertson* I."). This Court, of course, is not bound by the law of the case. *See, e.g.*, R. Stern, *et al.*, *Supreme Court Practice*, § 2.2, at 40-41. Moreover, the point of Phillips' petition for certiorari is that the *en banc* Eighth Circuit had the responsibility to address and resolve the partial remand question in the first instance and should not have been prevented from doing so by virtue of the law of the case doctrine.[4] The Eighth Circuit's

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[4] As suggested by Justice Ginsburg's questions to petitioner's counsel during oral argument in *Honda Motor Corp.* v. *Oberg*, No. 93-644, *cert. granted*, 114 S. Ct. 751 (argued Apr. 20, 1994), the issue whether "it's compatible with due process to have a new trial limited to punitive damages only, or whether you'd have to have the entire trial," Tr. at 7, is important and unresolved. Indeed, the first panel's decision to order a new trial limited solely to the issue of punitive damages conflicts with the decisions of several other circuits and is inconsistent with this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931). *See* Pet. at 14-15 & n.6.

The first panel's decision also conflicted with several other Eighth Circuit panel decisions, *see* Pet. at 14-15, and was integrally related to the other issues presented for *en banc* review. *See* Pet. App. 27a (Beam,

error raises an exceptionally important question because it imposes stringent and unwarranted limitations on the scope of *en banc* review that defeat the entire purpose of the *en banc* process and Fed. R. App. P. 35(a). The ruling effectively shields an entire class of cases from *en banc* review, and therefore can only increase the number of cases in which this Court's review will be required. *See* Pet. at 13.

To be sure, the courts of appeals have discretion to decide whether to grant *en banc* review in the first place, but this Court has made clear that "[i]f . . . [*en banc* review] is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals," and "the responsibility lies with this Court to define these requirements and insure their observance." *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 247, 260 (1953). Thus, Phillips is not asking this Court to "micromanage," Opp. at 14, the courts of appeals, but rather to clarify a fundamental question concerning the proper procedure by which the federal courts shall resolve important questions of federal law.[5]

J., dissenting). The court below did not disavow the importance of the partial remand question, or the intra- and inter-circuit conflicts that it has produced.

[5] Robertson's contention that Phillips "failed to preserve" the law of the case issue because it has "never asked this Court to vacate *Robertson* I," Opp. at 15, is without merit. Phillips was under no obligation to file a certiorari petition from the first panel's decision, since the Eighth Circuit had remanded the case for further proceedings and the decision therefore was not final. *See Virginia Military Institute*, 113 S. Ct. at 2431, 2432 (opinion of Scalia, J., respecting the denial of certiorari); *see* R. Stern, *et al.*, *Supreme Court Practice*, § 2.2 at 40. Indeed, this Court's practice strongly discourages litigants from filing certiorari petitions under such circumstances. *Virginia Military Institute*, 113 S. Ct. at 2432 (Scalia, J.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

Robertson's contention that "except before this Court," Phillips has never argued "that *Robertson* I should be revisited," Opp. at 9, 15, is

2. Question 2—The Constitutionality of the Arkansas "Shock the Conscience" Test.

Robertson does not dispute that the decision below sustaining the constitutionality of the Arkansas "shock the conscience" punitive damage review standard conflicts with the Fourth Circuit's decisions in *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) and *Johnson* v. *Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992) (*en banc*), and the Ninth Circuit's decision in *Morgan* v. *Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994). All three cases condemn as inconsistent with the due process principles articulated in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), the *ad hoc*, subjective and highly deferential judicial review process endorsed by the Eighth Circuit here.

Robertson instead defends the Arkansas shock the conscience standard on the merits, contending that a post-verdict review procedure has "evolved" (Opp. at 16) in Arkansas that imposes standards that "are limiting." *Id.* at 17. But that argument is a mirage because the Arkansas courts have never adopted or regularly applied such standards, and repeatedly declare that punitive damage verdicts must stand because they do not shock the conscience.[6]

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equally erroneous. Phillips challenged the first panel's partial remand at every stage of the proceedings below. *See* Supplemental Appendix, *infra*, 1a-2a (rehearing petition in first appeal); *id.* 3a-4a (petition for rehearing and suggestion for rehearing *en banc* in second appeal); *id.* 5a-6a (suggestion for rehearing *en banc* in third appeal); *id.* 7a-10a (supplemental briefs during rehearing *en banc*).

[6] *See, e.g., Maxwell* v. *Walser*, 751 S.W.2d 351, 353 (Ark. 1988) ("we cannot say that the . . . punitive damages . . . shocked the conscience of this court"); *Lindsey* v. *Watts*, 621 S.W.2d 679, 681 (Ark. 1981) ("A jury's award will not be set aside unless it is so disproportionate to the evidence that it shocks the conscience of the court."); *Parker* v. *Brush*, 637 S.W.2d 539, 540 (Ark. 1982) ("The awards, even if they cannot be described as modest[,] . . . certainly do not shock the con-

Moreover, while the district court here presented a laundry list of "factors" that had been mentioned by Arkansas courts, *see* Pet. App. 119a, there is no rhyme or reason in Arkansas law for applying any or all of those factors. In Arkansas, the reviewing courts simply mention whatever factors come into the vocabulary of the particular reviewing court. There is no "standard." A shock the conscience review is the antithesis of a meaningful standard; it is purely intuitive.

Most importantly, even if the courts below *had* applied standards *and* had found the awards to be excessive, Arkansas would not permit interfering with the jury's verdict unless the court was subjectively "shocked" by the size of the award. *See, e.g., O'Neal Ford, Inc.* v. *Davie*, 770 S.W.2d 656, 659 (Ark. 1989) (reversing trial court's remittitur of punitive damage award because trial judge was only "mildly surprised" by its size, rather than "shocked," and declaring that " '[a] belief by a trial court that damages are excessive is not, standing alone, a sufficient ground for ordering a reduction' "). This non-existent review of standardless jury discretion to impose unlimited punishment[7] cannot be squared with *Haslip*. *See* 499 U.S. at 20-22.

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science.").

Federal courts applying Arkansas law apply the same visceral approach. *See, e.g., Peoples Bank & Trust Co.* v. *Globe International Publishing, Inc.*, 978 F.2d 1065 (8th Cir. 1992) (refusing to overturn $800,000 punitive damage award as excessive, even though it found $650,000 compensatory award, on which the punitive award was based, "shockingly inflated"), *cert. denied*, 114 S. Ct. 343 (1993); *McGee* v. *Hester*, 815 F.2d 1193, 1197 (8th Cir.) ("Although the amount may seem large, we do not believe that it shocks the conscience."), *cert. denied*, 484 U.S. 963 (1987).

[7] "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." *Landgraf* v. *USI Film Products*, No. 92-757, slip op. at 37 (U.S. Apr. 26, 1994). However, "[u]nlike

The punitive damage jury instructions in this case were not "further constraints" that mitigated the need for rigorous judicial analysis. Opp. at 18. The *only* information concerning calculation of the amount of the award provided by the Arkansas model jury instruction given here was that punitive damages are imposed to punish and deter and that "[i]n arriving at the amount of punitive damages you may consider the financial condition of Phillips." Trial Transcript, Vol. III, at 208. Thus, in comparison with *Haslip*, the instruction here did not tell the jury "to take into consideration the character and degree of the wrong," *see* Pet. App. 95a, but *did* allow it to consider Phillips' wealth—an inflammatory factor that this Court has recognized creates a dangerous risk of prejudice to a defendant. *See Haslip*, 499 U.S. at 19, 22; *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2723 (1993). In short, the punitive damage jury instruction in this case made close and objective judicial review of the verdicts more, not less, necessary.[8]

3. Question 3—The Duplicative Punishment Issue.

Robertson devotes its entire argument concerning Question 3 to its assertion that "'Phillips got what it asked for'" when the jury imposed two separate $4,000,000 punitive damage awards for causing a single injury to Rob-

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criminal penalties, . . . punitive damages are not awarded within discernible limits." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting). As Justice Brennan recognized, the lack of any legislatively established "range of penalties as to which responsible officials had deliberated and then agreed" requires that the courts "look longer and harder" at punitive damage awards than other types of monetary punishments "that fall within statutory limits." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

[8] Indeed, three of the dissenting judges concluded that the punitive damage jury instruction "was unconstitutional." Pet. App. 39a.

ertson.[9] But Phillips never "asked" to be punished twice in this case. As thoroughly documented,[10] Phillips consistently objected to the first panel's confusing and unfair partial remand, which ultimately produced the two punishments for the same injury. *See* Pet. App. 52a n.24 (Beam, J., dissenting); Pet. at 14 n.5. Indeed, Robertson's contention that Phillips asked to be subjected to the duplicative awards "requires . . . a substantial misinterpretation of Phillips' reply brief in *Robertson* I." Pet. App. 45a n.17 (Beam, J., dissenting). Phillips' position in *Robertson* I was that the "global" $5,000,000 punitive damage verdict may have improperly rested on (1) the jury's finding that Phillips had breached its "duty of good faith and fair dealing," a finding that "was set aside by the district court after trial"; (2) the negligence count, for which punitive damages were not permissible; or (3) the fraud count reversed by the first panel decision. *Id.* 46a n.17. "Transformation of this argument [against a punitive damage award based upon an inappropriate or discredited legal theory] into a request by Phillips for consideration of duplicative punitive awards by the jury, is . . . a clearly incorrect reading of Phillips' brief." *Id.*[11]

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[9] Robertson's opposition contains a number of incorrect statements regarding Phillips' conduct and the nature of Robertson's injury. While it is unnecessary to address each and every one of these material distortions of the record at this stage, suffice it to say that there has never been *any* finding in this case—not by the two juries, the district court, nor the Court of Appeals—that Phillips "destroyed" Robertson. *See* Opp. at 3. There was "only one injury, [Robertson's] loss of the Spe-Dee Mart account," Pet. App. 3a, and the first jury found that Robertson itself was 30% responsible for that loss. Pet. App. 101a. Nonetheless, Robertson was fully compensated for the *entire* loss in February 1988. *See* Robertson's Supplemental Appendix.

[10] *See* Supplemental Appendix, *infra*, 1a-10a.

[11] Robertson's vehement criticisms of Phillips for purportedly changing positions ring particularly hollow since "it is Robertson, not Phillips, that has changed position as the litigation has progressed on the proper

The fact that Phillips did not object to the verdict form on the ground that it permitted the jury to consider both theories of liability and return separate verdicts for each does not constitute a "waiver" by Phillips or mean that Robertson is entitled to collect a double windfall. Rather, under the federal election of remedies doctrine the jury generally is allowed to consider both theories, and the plaintiff must elect between the two. *See, e.g., Kelco Disposal Inc.* v. *Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir. 1988), *aff'd.*, 492 U.S. 257 (1989); *Fineman* v. *Armstrong World Indus. Inc.*, 980 F.2d 171, 218-19 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1285 (1993). Multiple penalties for the same injury also is a proper part of any meaningful excessiveness review. *Cf. Haslip*, 499 U.S. at 22.

Robertson's argument that the two separate theories of liability justify separate punishments not only conflicts with decisions of other state and federal courts, *see* Pet. at 20-21, but also ignores the fact that only the alleged tortious interference even arguably had a causal connection to Robertson's single injury. Pet. App. 47a (Beam, J., dissenting). Moreover, both theories were predicated on the same ultimate action—Phillips' refusal to fulfill a gratuitous commercial promise. *Id.* 53a. The infliction of two punishments here is completely redundant and utterly irrational.

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approach to awarding damages." Pet. App. 45a n.16 (Beam, J., dissenting).

CONCLUSION

For the foregoing reasons and those set forth in the petition, the Court should grant certiorari and set this case for plenary consideration.

May 4, 1994

Respectfully submitted,

ROBERT L. JONES, JR.
JONES, GILBREATH, JACKSON & MOLL
P.O. Box 2023
Fort Smith, AR 72902
(501) 782-7203

WILLIAM H. SUTTON
KEVIN A. CRASS
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Bldg.
400 West Capitol Avenue
Little Rock, AR 72201-3493
(501) 376-2011

*THEODORE B. OLSON
THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

WILLIAM G. PAUL
NEAL F. LEHMAN
PHILLIPS PETROLEUM COMPANY
1136 Adams Building
Bartlesville, OK 74004
(918) 661-5650

Attorneys for Petitioner

*Counsel of Record

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1266WA

ROBERTSON OIL COMPANY, INC.
APPELLEE

v.

PHILLIPS PETROLEUM COMPANY
APPELLANT

PETITION FOR REHEARING

Appellant Phillips Petroleum Company for its Petition for Rehearing states that:

[1] 1. The Opinion of the panel correctly applies the rule of *Dudley v. Dittmer*, 795 F.2d 669 (8th Cir. 1986) to order a new trial on punitive damages. However, the Opinion fails to follow the precedent of *Dittmer* by not requiring a complete new trial on both compensatory and punitive damages since both damage issues were decided on general verdicts and were inextricably intertwined with the issues of liability.

* * *

I.

PHILLIPS IS ENTITLED TO A NEW TRIAL ON ALL ISSUES

[2] This Court has determined that the evidence was sufficient below to submit the theories of fraud, tortious interference with contract and negligence to the jury. However, the Court has ordered a partial new trial because proper issues were submitted to the jury along with improper issues (i.e. duty of good faith and fair dealing,

negligence and fraud) on a general verdict. Phillips respectfully submits that the law of the Eighth Circuit requires a new trial on all issues.

* * *

[4] Further support for this result is found in *Slater v. KFC Corporation,* 621 F.2d 932 (8th Cir. 1980) [relied upon by the Court in *Dittmer*], where the jury awarded Slater $265,000 in actual damage and $100,000 in punitive damages on claims of fraud. The Court of Appeals upheld the sufficiency of the evidence on the fraud theory but concluded that the damage instructions were erroneous. In considering whether to order a new trial on all issues or merely damages, the Court noted:

> "In addition, any award of punitive damages must turn on an assessment of KFC's conduct. Thus, we conclude that the issues of damages and liability in this case are so interwoven as to require a new trial on both."

621 F.2d at 938. *See also National By-Products, Inc. v. Searcy House Moving Co., Inc.,* 292 Ark. 491, 731 S.W.2d 194 (1987) [5] ("When we reverse a judgment for punitive damages, we normally must also reverse the award for compensatory damages because the issues are so interwoven that an error with respect to one requires a retrial of the whole case.")

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IN THE UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

NO. 90-1451 WA

ROBERTSON OIL COMPANY, INC.
APPELLEE

vs.

PHILLIPS PETROLEUM COMPANY
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

HONORABLE MORRIS S. ARNOLD, DISTRICT JUDGE

PETITION FOR REHEARING AND SUGGESTING FOR REHEARING *EN BANC*

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* * *

[5] The district court did not, however, instruct the jury in the second trial to make fresh determinations regarding whether Phillips was liable for tortious interference or whether it acted with malice, instead directing a verdict on the issue of [6] liability for punitive damages on that count. But in a legally indistinguishable situation, this Court in *Western Fireproofing v. W.R. Grace,* 896 F.2d 286 (8th Cir. 1990), refused to permit the type of a partial trial to which Phillips was subjected, stating that

> "a partial new trial . . . may not be properly resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. In the circumstances of this

> case, *we conclude the question of punitive damages is not sufficiently distinct from the question of liability for fraud and tortious interference to permit a new trial on the issue of punitive damages alone.*"

896 F.2d at 293 (quoting *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931)) (emphasis added). In this case, not only was Phillips subjected to a "partial new trial" on punitive damages alone, but the jury was never squarely instructed that an express finding of malice was a necessary predicate to the imposition of punitive damages for tortious interference with contract. That resulted in a gross and manifest injustice that deprived Phillips of its right to a fair trial and violated the Due Process Clause.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 91-3717 WAFS

ROBERTSON OIL CO.,

Appellee,

v.

PHILLIPS PETROLEUM CO.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF ARKANSAS

PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING *EN BANC*

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* * *

[7,n.4] Although *Robertson* I determined that the initial $5,000,000 punitive damage award was impermissible, it let stand the first jury's finding of liability on the tortious interference count and the $750,000 compensatory award explicitly because there was only one injury to Robertson in this case. 871 F.2d at 1376. The second trial therefore dealt only with the issue of Phillips' liability for fraud and Robertson's claims for punitive damages based on both its fraud and tortious interference theories. The limited scope of the *Robertson* I remand not only was "incorrect" and resulted in "a manifest injustice," slip op. at 22 & n.1 (Beam, J., dissenting), but it also directly conflicts with Supreme Court and Eighth Circuit authority. *See Gasoline Products Co. v. Champlin Refining Co.*, [8] 283 U.S. 494, 500 (1931) (ordering a partial retrial is constitutionally impermissible unless remanded issue "is so distinct and sep-

arable from the others [in the trial] that a [new] trial of it alone may be had without injustice."); *Western Fireproofing v. W.R. Grace & Co.*, 896 F.2d 286, 293 (8th Cir. 1990) (applying *Gasoline Products* and holding that retrial on "issue of punitive damages alone" in fraud and tortious interference case impermissible).

* * *

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 91-3717 WAFS

ROBERTSON OIL CO.,

Appellee,

v.

PHILLIPS PETROLEUM CO.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

SUPPLEMENTAL BRIEF FOR APPELLANT

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* * *

[1] . . . it is well settled that the law of the case doctrine is inapplicable when a federal court of appeals sitting *en banc* considers a case that has been the subject of multiple panel decisions.

In *Watkins v. United States Army,* 875 F.2d 699 (9th Cir. 1989) (*en banc*), *cert. denied,* 111 S. Ct. 384 (1990), the Ninth Circuit, sitting *en banc* after the second appeal of a case, [2] squarely overruled the first panel's decision. *Id.* at 705. The court flatly held that "[t]he law of the case doctrine does not . . . prevent us from considering the issues raised in *Watkins* I." *Id.* at 704 n.8.

Similarly, in *Shimman v. International Union of Operating Engineers, Local 18,* 744 F.2d 1226 (6th Cir. 1984) (*en banc*), *cert. denied,* 469 U.S. 1215 (1985), the Sixth Circuit held that "[t]he law of the case doctrine . . . does *not* impair the power of an en banc court to overrule *any*

panel decision," *id.* at 1229 n.3 (emphasis added), including prior panel decisions in the same case. The court went on expressly to overrule the decision four years earlier of the first panel to hear an appeal in the *Shimman* case.

Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) *(en banc), aff'd*, 444 U.S. 472 (1980), like the case at bar, involved *en banc* review after three different appeals in the same case. The full Second Circuit rejected the argument that "the court sitting *en banc* [should] . . . consider itself bound by the law of the case established by a panel on an earlier appeal, when that ruling was not reviewed *en banc.*" *Id.* at 436-37 n.9. The court explained:

> The purpose of the 'law of the case' doctrine is to prevent the continuous relitigation of issues decided by a panel at an earlier stage of a suit. The doctrine, which is . . . no more than an appeal to . . . 'good sense' . . . is properly applied to the district court and to other panels of the Court of Appeals. *It cannot immunize panel decisions from review by the court en banc.*

Id. at 437 n.9 (citations omitted; emphasis added).

* * *

[3] In short, this Court is free to revisit any previously decided issue in this case that relates to the important questions presented for *en banc* review.

* * *

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 91-3717 WAFS

ROBERTSON OIL CO.,

Appellee,

v.

PHILLIPS PETROLEUM CO.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

APPELLANT PHILLIPS PETROLEUM COPMPANY'S REPLY TO APPELLEE'S SUPPLEMENTAL BRIEFS

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* * *

[7] As Judge Beam recognized in his dissenting opinion in *Robertson* III, these factors are present here. For example, the decision in *Robertson* I[5] to remand this case for a retrial limited to the issue of punitive damages, while at the same time sustaining Phillips' liability for the $750,000 compensatory award, not only was clearly incorrect under cases such as *Western Fireproofing Co. v. W.R. Grace & Co.*, 896 F.2d 286, 293 (8th Cir. 1990) (retrial of "issue of punitive damages alone" in fraud and tortious interference case impermissible), and *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931), but that approach has resulted in "a manifest injustice to Phillips as the case has now developed." *Robertson* III, slip op. at 22 n.1 (Beam, J., dissenting).

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[5] 871 F.2d 1368 (8th Cir. 1989).

[8] Indeed, the peculiar and confusing *Robertson* I remand—coupled with the standardless, exclusively wealth-based Arkansas model jury instruction—produced two $4,000,000 punishments against Phillips for causing "only one injury" (*Robertson* III, slip op. at 2), that violate the Due Process Clauses of the Fifth and Fourteenth Amendments.

* * *